LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 16 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 1329

SOUTHERN CALIFORNIA EDISON COMPANY,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROLLIN E. WOODBURY
HARRY W. STURGES, JR.
WILLIAM E. MARX
Attorneys for Petitioner,
Southern California Edison Company
P. O. Box 351
Los Angeles, Calif. 90053

Of Counsel:

WILLIAM R. CONNOLE
1000 Connecticut Avenue, N. W.
Washington, D. C.

R. CLYDE HARGROVE
P. O. Box 188
Shreveport, Louisiana

April 16, 1968

TOPICAL INDEX

	Page
Citation to Opinion below	1
Jurisdiction	1
Questions presented for review	2
Constitutional provisions, statutes, and regulations involved	5
Statement of the case	5
Reasons for granting Writ	10
What the Commission did	12
1. The Commission flagrantly violated its own Rules of Practice and Procedure and the Administrative Procedures Act and denied Edison a fair hearing	12
2. The Commission frustrated local police regulations designed to alleviate air pollution which involved no conflict with national air pollution policies and no conflict with the policies of The Natural Gas Act as heretofore construed by this Court and in so doing exceeded its jurisdiction	20
3. The Commission arbitrarily changed the ground rules which it had previously established as justification for its delay in processing the Gulf Pacific application	24
4. The Commission unlawfully applied the provisions of The Natural Gas Act and in so doing exceeded its authority	27
(a) The Commission applied improper standards of public convenience and necessity	27
(b) The Commission unlawfully applied the provisions of The Natural Gas Act relating to direct industrial sales	29
What the Commission did not do	30
5. The Commission failed, or refused, after determining to certificate the El Paso and Transwestern proposals, to so condition such certificates as to protect the constitutional rights of Edison in spite of timely request by Edison for such a condition	30

Page

What the Court of Appeals did 31

The Court of Appeals erred in concluding that the Commission's orders were rationally based, supported by the record and reached by procedures required by law 32

1. The Court of Appeals' conclusion that the Commission's order was rationally based contained an inherent ambiguity and was erroneous upon all alternative interpretations 32

2. The Court's conclusion that the Commission's action was supported by the record and reached by procedures required by law is in error and sanctions such a departure from the accepted and usual course of administrative procedure as to call for the exercise of this Court's power of supervision 36

3. Failure of Court of Appeals to resolve ambiguity it created unlawfully denied Edison its statutory review 37

Conclusion 38

Appendices

A. Judgment of the United States Court of Appeals for the Third Circuit, No. 16,434, dated December 21, 1967 ..... 1a

Opinion of the United States Court of Appeals for the Third Circuit, filed December 21, 1967 ..... 2a

SUR Petition for Rehearing (dated: January 24, 1968) 4a

B. Constitutional provisions, statutes and regulations 5a

U.S. Constitution, Amend V 5a

Natural Gas Act, Sec. 1(b) 5a

Sec. 7(c) 6a

Sec. 7(e) 7a

Sec. 19(b) 8a

		Page
	Administrative Procedures Act, Sec. 5	9a
	Sec. 6	10a
	Sec. 7	11a
	Sec. 10	12a
	Title 28 U.S.C. § 1254	13a
	Regulations Under the Natural Gas Act, § 157.11	13a
	Rules of Practice and Procedure of the Federal Power Commission, § 1.26	14a
C.	Chronological Statement	15a
D.	Revision of Commission's Gas Balance Study to correct defects	19a
E.	Summary of reasons in support of Court of Appeals determination that case at bar not moot	32a

TABLE OF AUTHORITIES CITED

Cases	Page
Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945)	25, 26, 34a
Cascade Natural Gas Co. v. El Paso Natural Gas Co., 386 U.S. 129 (1967)	10, 33a
El Paso Natural Gas Co., G-12580, 22 FPC 900	19, 21
El Paso Natural Gas Company, Docket G-16235, 30 FPC 77	4, 24, 26, 15a
FPC v. Idaho Power Co., 344 U.S. 17 (1952)	33
FTC v. Standard Oil Co., 355 U.S. 396 (1958)	37
Federal Power Commission v. Transcontinental Pipeline Corp., 365 U.S. 1 (1961)	29
Florida Gas Transmission Corp., FPC Docket CP65-393, Op. No. 516 issued March 1, 1967	29
Houston Texas Gas and Oil Corp., et al. 16 FPC 118 (1956)	20, 27
Huron Cement Co. v. Detroit, 362 U.S. 440 (1960)	22, 35a
Kansas Pipeline and Gas Company, et al. 2 FPC 29 (1939)	20, 27, 28
Market Street Railway v. Railroad Comm., 324 U.S. 548 (1945)	13, 16, 17, 18, 35
Montana-Dakota Utilities v. FPC, 169 F.2d 392 (1948)	32
Natural Gas Pipeline Co. of America, FPC Docket No. CP 62-243, et al., Opinion No. 474 issued September 9, 1965 34 FPC 771	29
Ohio Bell Telephone Co. v. PUC, 301 U.S. 292 (1937)	13, 18, 36, 37
Pan American Petroleum Corp. v. FPC, 376 F.2d 161 (1967)	33
People v. Plywood Mfrs. of Cal., etc., 137 C.A.2d 859; 291 P.2d 587 (1955)	22
Pittsburgh (City of) v. FPC, 237 F.2d 741 (1956)	32, 32a

Page

S.E.C. v. Chenery Corp., 318 U.S. 80 (1943) 33

Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (1965), cert. denied 384 U.S. 941 ..... 32, 32a

Sunray Mid-Continent Oil Co. v. FPC, 353 U.S. 944 (1957) 33

Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961) 7

Union Pacific R. Co. v. Public Service Comm., 103 Utah 459; 135 P.2d 915 28

United States of America v. El Paso Natural Gas Company, 376 U.S. 651 (1964) 5, 10, 34a

Welch Co. v. New Hampshire, 306 U.S. 79 (1939) 22

Constitutions

United States Constitution
Fifth Amendment 2, 3, 5, 12, 5a

Miscellaneous

Annotation, 18 ALR 2d, pp. 552 et seq. 13

Executive Order 11282 dated May 26, 1966 22

Pres. Proc. No. 3794 of July 19, 1967 10

Regulations Under the Natural Gas Act (18 C.F.R. Sec. 157.11) 2, 5, 24, 27

Rules

Rules for the United States Supreme Court
Rule 19, et seq. 2

Rules of Practice and Procedure of the Federal Power Commission § 1.26(d) 2, 5, 12, 20, 36

Rules of the Air Pollution Control District of the County of Los Angeles adopted by the Los Angeles County Board of Supervisors
Rule 62 ..... 6, 21
Rule 62.1 ..... 6, 21

Page

Statutes

Administrative Procedures Act 12, 20, 24
Section 5(a) 2, 5
Section 5(b) 2, 5
Section 6(a) 5, 24, 27
Section 7(c) 2, 5, 12
Section 7(d) 2, 5, 12, 36
Section 10(e) 5

Air Quality Act of 1967, Public Law 90-148, 81 Stat. 485 ..... 22, 24
Section 108(b) 24
Section 109 24

Clean Air Act adopted December 17, 1963, Public Law 88-206, 88th Cong., H. R. 6518 ..... 22, 23
Section 2(b) 23

Natural Gas Act 2, 3, 11, 20, 27, 29, 30
Section 1(b) 3, 5, 29
Section 7(c) 2, 3, 5, 8, 12, 24
Section 7(e) 5
Section 19(b) 2, 5, 9, 36, 37

United States Codes
Title 15, Section 717(b) 3, 5
Title 15, Section 717f(c) 5, 24
Title 15, Section 717f(e) 5
Title 15, Section 717r(b) 2, 5, 9
Title 28, Section 1254(1) 2, 5

Texts

2 Davis, Administrative Law Treatise, pages 403-404 13
2 Davis, Administrative Law Treatise, page 418 13

GLOSSARY

Edison or Petitioner	Southern California Edison Company
Commission or FPC	Federal Power Commission
Pacific Lighting	Southern California Gas Company, Southern Counties Gas Company and Pacific Lighting Service and Supply Company (collectively)
Gulf Pacific	Gulf Pacific Pipeline Company
El Paso	El Paso Natural Gas Company
Transwestern	Transwestern Pipeline Company
Gulf Pacific Project	That Supply Proposal Applied for In FPC Docket CP63-223
APCD	Air Pollution Control District of the County of Los Angeles
TSP	The so-called Tailored Supply Program of Pacific Lighting Consisting of the El Paso and Transwestern Applications in FPC Dockets CP 64-76 and CP64-91 Which Was Adopted By The Commission
Jt. App.	The Joint Appendix Filed With The Court of Appeals for the Third Circuit in No. 16434
Comm. Br. to the CA for the 3rd Cir.	Commission's Brief to the Court of Appeals for the Third Circuit

IN THE

Supreme Court of the United States

October Term, 1967

No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Southern California Edison Company (Edison), prays that a writ of certiorari be issued to review a judgment of the United States Court of Appeals for the Third Circuit entered December 21, 1967, in No. 16434 affirming Decisions Nos. 500 (R. 68820-960, Jt. App.* pp. 738-878) and 500-A (R. 69314-38, Jt. App. pp. 1057-81) of the Federal Power Commission** (hereinafter sometimes referred to as "Commission" or "FPC").

CITATION TO OPINION BELOW

The judgment and supporting opinion of the Court of Appeals for the Third Circuit of December 21, 1967 and Order denying rehearing are printed as Appendix A hereto (*infra*, pp. 1a to 4a) and have not yet been reported. The orders of the Federal Power Commission under review are printed in the Joint Appendix below (R. 68887-90, Jt. App., pp. 805-8 and R. 69328, Jt. App., p. 1071) and are reported at 36 FPC 176, and at 36 FPC 1010, respectively.

JURISDICTION

The opinion of the Court of Appeals was filed on December 21, 1967, and the judgment was entered on December 21, 1967. A petition for rehearing was filed by petitioner on January 5, 1968, and the Court of Appeals' order deny-

* "Jt. App." refers to Joint Appendix filed with the United States Court of Appeals for the Third Circuit in No. 16434.

** *In re Transwestern Pipeline Company, et al.*, FPC Dockets CP 63-204, et al.

ing rehearing was entered on January 24, 1968. Jurisdiction of this Court over said judgment is invoked under Title 28 U.S.C. § 1254(1) pursuant to Rules 19, et seq., of this Court and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b) (1958). Said statutory provisions are set forth in Appendix B hereto (pp. 8a-9a, 13a, *infra*).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Federal Power Commission, under the guise of administrative expertise, may depart from procedures specified in its own rules and in Section 7(c) and (d) of the Administrative Procedures Act by reaching a decision in a certificate proceeding, involving competing applications, through reliance on material outside the record which significantly influences the decision and which a party is denied, after timely request, opportunity to meet and rebut, particularly when such material is demonstrably wrong in a number of material respects, and results in a denial of a fair hearing and in the deprivation of property without due process of law in contravention of the Fifth Amendment to the Constitution of the United States (U. S. Const. Amend. V; Natural Gas Act (Sec. 7(c)); Administrative Procedures Act (Sec. 5(a) and (b) and Sec. 7(c) and (d)); Regulations Under The Natural Gas Act (§ 157.11); and §1.26(d) of the Rules of Practice and Procedure of the Federal Power Commission.

2. Whether the grant of the certificating powers to the Federal Power Commission in the Natural Gas Act is intended to permit the FPC effectively to preempt state and local air pollution control laws and regulations, which are not incompatible with any defined policy of the Federal Government, and to be so broad as to permit the FPC to frustrate and prevent the consummation of a pipeline project which undeniably would have reduced fuel oil burning in the local area involved, in accordance with the desires of the Air Pollution Control authorities and the public,

particularly where there was no finding that the consummation of such project would be harmful to any other areas or would deprive them of adequate gas supplies and where there was no question of the projects' meeting the traditional tests of public convenience and necessity, i.e., adequacy of supply and market, economic feasibility and ability to finance (Natural Gas Act, Section 7(c)).

3. Whether the Federal Power Commission in granting certificates of public convenience and necessity under the Natural Gas Act (Sec. 7(c)) can arbitrarily, under the guise of administrative discretion, refuse to attach conditions which are both appropriate and essential to protect a party's rights to due process of law under the Fifth Amendment of the Constitution of the United States (U.S. Const., Amend. V).

4. Whether the Commission, in denying the Gulf Pacific Pipeline Company (Gulf Pacific) application, exceeded its authority and improperly applied the statutory standards of the Natural Gas Act:

a. By preventing more adequate compliance with the local air pollution controls, thereby frustrating their purpose and the desires of the public;

b. By utilizing its certificate powers to perpetuate a monopolized gas supply situation by requiring Edison to take gas service from its chief competitors for the energy market, instead of from a new independent gas supplier in one of the few areas in the United States now served solely by one affiliated gas utility system; and

c. By determining in this case that the statutory exemption for direct sales (Section 1(b) of the Natural Gas Act, (15 U.S.C. § 717(b)) is limited to such sales which are "a useful adjunct to the normal pattern of interstate pipelines." (R. 68881, Jt. App., p. 799)

5. Whether the Commission arbitrarily denied to Edison fair comparative consideration upon the basis that it had

previously established for the proceeding, namely "to determine how the long term needs for natural gas deliveries to Southern California may be met in the manner which is most desirable from the standpoint of the public interest". (*Re El Paso Natural Gas Company*, Docket G-16235, 30 FPC 77, 92).

6. Whether the Court of Appeals erred in concluding that the Commission's orders were rationally based, supported by the record and reached by procedures required by law.

7. Questions arising from an inherent ambiguity of the decision of the Court of Appeals:

a. Whether the Court of Appeals, in its decision affirming the orders of the Federal Power Commission, concluded that a basis different from that used by the Commission could rationally support the result and, in so doing, has exercised its judicial review in a way in conflict with the applicable decisions of this Court and with the decisions of other Courts of Appeal and, in so doing, has erred;

b. Whether the Court of Appeals, in its decision affirming the orders of the Federal Power Commission, upheld the reliance by that Commission upon its defective gas balance study and other material also outside of the record and, in so doing, has sanctioned such a departure by the Commission from the accepted and usual course of judicial and administrative proceedings as to call for an exercise of this Court's power of supervision.

8. Whether the Court of Appeals erred in denying Edison's petition for rehearing which sought clarification of the inherent ambiguity in the Court of Appeals' decision, in order that the parties and this reviewing Court could be appropriately apprised of the basis for the Court of Appeals' decision affirming the Commission's orders.

9. Whether the Court of Appeals denied petitioner the appropriate judicial review to which it is entitled under the Natural Gas Act (Section 19(b)).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The provision of the United States Constitution involved is Amendment V (U.S. Const. Amend. V).

The statutory provisions involved are Title 28 U.S.C., Section 1254(1); Sections 1(b), 7(c), 7(e) and 19(b) of the Natural Gas Act (15 U.S.C. Sections 717(b), 717f(c), 717f(e) and 717r(b)) and Sections 5(a) and (b), 6(a), 7(c) and (d), and 10(e) of the Administrative Procedures Act (Chapter 24 — Public Law 404, 60 Stat. 237-244 (1946).

The regulations involved are § 157.11 of Regulations Under The Natural Gas Act (18 C.F.R. § 157.11) and § 1.26(d) of the Rules of Practice and Procedure of the Federal Power Commission (18 C.F.R. § 1.26(d)).

The Constitutional provision, statutes and regulations relied upon are printed in Appendix B hereto as pp. 5a-14a.

STATEMENT OF THE CASE

Edison, a California corporation, is engaged in the business of generating, distributing and selling electric energy as a public utility principally in certain portions of central and southern California. The territory served by it contains an estimated population in excess of 7,000,000 people. To supply essential electric utility service to the area, Edison operates a number of steam electric generating plants in southern California.

In its continuing efforts to make arrangements for long term fuel supplies for such generating plants, in the face of the monopolized gas supply situation heretofore recognized by this Court in *United States of America v. El Paso Natural Gas Company*, 376 U.S. 651 (1964), involving similar aspects to this increasingly difficult problem, Edison en-

tered into the arrangements underlying the Gulf Pacific Project to firm up supplies for its long term needs for gas fuel from a reliable competitive source.

The needs of Edison for long-term assured natural gas supply arrangements, of the type exemplified by those involved in the Gulf Pacific Project, resulted from the changed circumstances which have occurred in the southern California area since World War II, requiring revolutionary changes in the operations of the electric utilities in that area. These resulted primarily from two main circumstances.

1. The demands of an exploding postwar population in Edison's territory for electricity quickly outstripped the capacity of the limited number of hydroelectric plants that could be built on the few sites in that semi-arid area; Edison therefore had to adopt a massive construction program to develop new steam electric generating stations.[1]

2. The need to increase the use of natural gas by the electric utilities in their steam electric generation in order to meet public demand to decrease the use of fuel oil because of air pollution and to comply with the legislated regulations of local authorities designed for air pollution control.[2]

---

[1] To illustrate: Before World War II, the Edison system, from an electric energy production standpoint, was primarily dependent upon hydroelectric generation for its main energy requirements, supplemental energy being supplied by thermal generation from a single steam electric station. In 1940, for example, of a total of 3,654 million kilowatt-hours transmitted, less than 4 percent was thermal generation. In contrast, in 1962, steam plants on the Edison system supplied about 80 percent of the 23,900 million kilowatt-hours transmitted, and its total fuel bill increased from less than $250,000 in the year 1940 to more than $64,000,000 in 1962. (Horton, R. 300-3, Jt. App., pp. 4-6; Ex. 40, R. 29249, Jt. App., p. 187; Chart 4-A of Ex. 361, R. 32828, Jt. App., p. 338).

[2] In Los Angeles County, for example, air pollution control ordinances require that the electric generating agencies burn gas rather than residual oil, which has been generally relied on as backup fuel for electric generation, at any and all times that gas is made available by the local gas distributing companies. Rules 62 and 62.1 of the Air

During the period since the end of World War II, the gas supplies available to Edison for electric generation have principally come from the Pacific Lighting companies (Southern California Gas Company and Southern Counties Gas Company of California, referred to herein along with Pacific Lighting Service and Supply Company as "Pacific Lighting") which provided service to the electric generating utilities only upon an "interruptible" basis,[3] with the electric generating utilities having the lowest priority and being the first to be curtailed. The amount of gas available under such type of service varies greatly from time to time during the year and from year to year, depending upon the gas resources available at any particular time to Pacific Lighting and its other market requirements, and these, in turn, are substantially affected by the weather, since its higher priority customers utilize many times more gas in cold weather than in warm weather (Ex. 41, pp. 54, 56, 57, R. 29309, 29311-12, Jt. App., pp. 190-2).[4]

As has heretofore been recognized by this Court, the assurance of a steady and ample supply of fuel for steam electric generation and the need for adequate arrangements therefor by an electric utility is in the public interest; otherwise electric consumers are exposed to unjustified increased costs and to service failures. (See: *Tampa Electric Co. vs. Nashville Coal Co.*, 365 U.S. 320, 334 (1961)).

Pollution Control District of the County of Los Angeles (APCD) adopted by the Los Angeles County Board of Supervisors (Ex. 45, pages 24, 24a, R. 29582-3, Jt. App., pp. 235-6; Horton, R. 303-5, Jt. App., pp. 6-7).

[3] "Interruptible" gas schedules permit the seller to curtail buyers' gas supply in whole or in part at any time and from time to time upon short notice. In the case of Edison, the sellers are the same gas companies (Pacific Lighting) who are also Edison's principal rival for the hotly contested energy market in southern California. (C.f., Chart 4-B and 4-D of Ex. 41, R. 29295, 29306, Jt. App., pp. 188-9).

[4] For example, between an average year and a cold year, gas supplies available for electric generation have varied as much as the equivalent of 6,000,000 bbls. of oil. (Kelsey, R. 9962, Jt. App., p. 100).

Faced with these circumstances, Edison and the City of Los Angeles Department of Water and Power negotiated contracts with Humble Oil and Refining Company and other Texas producers for an assured gas supply for a twenty-year period, and with Gulf Pacific for the transportation of such supply to their respective steam electric generating stations in the Los Angeles area, the net result of which was stabilized delivered prices for gas for twenty years at levels which were competitive with the prices being paid by the electric utilities for the inferior service of the Pacific Lighting companies (Horton, R. 306-10, Jt. App., pp. 7-9). In addition, the utilization of such gas in such electric generating stations would have uncontradictably meant that substantially less fuel oil would have had to be burned in the area, in accordance with the demands of the public in southern California, and would have permitted greater compliance with the regulations and desires of the air pollution control authorities in southern California (Horton, R. 303-7, Jt. App., pp. 6-8; Proctor, R. 18156, 18163, 18419-22, Jt. App., pp. 131-4; Ex. 639, 640, R. 35979-82, Jt. App., pp. 364-7).

The Commission's proceedings below involved the purported comparative determination by the Commission of three separate applications for certificates of public convenience and necessity under Section 7(c) of the Natural Gas Act for facilities required to deliver additional gas to California. The proceedings, which were held before an FPC Examiner, involved 170 days of hearing, a transcript in excess of 28,000 pages and almost 900 exhibits; the Examiner who presided over the proceedings recommended certification of the Gulf Pacific Project (R. 66634, Jt. App., p. 679). The majority of the Commission, however, reversed the Examiner and, in so doing, placed substantial reliance upon outside-the-record data, including a complicated gas balance study (a study purporting to determine which combination of alternative gas supplies

would meet the market requirements at the lowest cost) which was the central basis of its conclusions upon the comparative economics involved; such data were never presented at the hearings, and Edison was denied all opportunity to test or rebut such data, though it made timely request to be permitted to do so in its petition to the Commission for rehearing.[5] The Commission also committed a number of additional legal errors which were prejudicial to Edison.

Edison, an intervenor and interested party in the proceedings and one of the entities for whom Gulf Pacific was to transport gas in FPC Docket No. CP63-223, being aggrieved by Opinions Nos. 500 and 500-A, and accompanying Orders dated July 26, 1966, and December 9, 1966, respectively, sought review of said orders in the United States Court of Appeals for the Third Circuit under Section 19(b) of the Natural Gas Act (15 USC § 717r(b)). The Court of Appeals having affirmed the Commission's orders on December 21, 1967, and denied Edison's petition for rehearing on January 24, 1968, Edison seeks here to have said Commission orders reviewed as well as the Third Circuit's judgment affirming those orders.[6]

REASONS FOR GRANTING WRIT

Petitioner is gravely concerned with the effect of the aforesaid unlawful actions on its ability to obtain adequate fuel supplies for its electric generating plants in the years ahead so as to continue to provide essential electric utility service in a reliable, efficient and economical manner to the more than 7,000,000 people in its service area; this must be done in the face of unrelenting pressures from local regulatory agencies and the public generally to discontinue use of conventional fuel oil in such generating plants and

[5] Edison's petition to Commission for rehearing, p. 14, R. 68991, Jt. App., p. 901.

[6] A more complete chronological statement of the proceedings is set forth in Appendix C.

in the face of a persisting monopolized market supply situation heretofore dealt with by this Court in *USA v. El Paso Natural Gas Co.*[7] and *Cascade Natural Gas Co. v. El Paso Natural Gas Co.*[8] So long as the Commission's decision in the case at bar stands unreversed, it imposes a formidable burden on anyone seeking to interest new gas suppliers in mounting any new project similarly designed to serve the electric utilities in southern California.

To the extent that petitioner is denied success in its more than 10-year effort to obtain an adequate and competitive supply of gas fuel for the enormous and increasing requirements of its electric generating plants, it is faced with a Hobson's choice of either having to place increased reliance upon conventional residual fuel oil (the burning of which has been restricted by air pollution control authorities in southern California and the local production of which is being severly limited by the oil producing industry in southern California because of such action by the air pollution control authorities), or of having to resort to the use of considerably more costly "low sulphur" fuel oil that is only available to a limited extent and then only from overseas sources of supply (primarily Indonesia), thus rendering such alternative supply not only costly but of questionable reliability from both a logistics and national security standpoint. (C.f., Pres. Proclamation No. 3794 July 19, 1967, 32 F.R. 10547) The Commission's failure to consider such aspects of this increasingly difficult community problem, its denial to Edison of a fair hearing on these and related economic issues and the apparent sanctioning thereof by the Court of Appeals has lead Edison to seek further review of the Commission's action by this Court because of the importance of the unresolved problems involved which so vitally affect such a large segment of the public.

---

[7] 376 US 651 (1964).

[8] 386 US 129 (1967).

We believe that this Court will not consider lightly: (1) any decision and order by a regulatory agency that results in placing in jeopardy essential electric energy supplies for more than 7,000,000 people, as well as for essential industries and enterprises such as hospitals and defense installations and requiring increased reliance on foreign sources of oil, as did the challenged Commission orders; nor (2) any administrative decision which requires the electric utilities to operate in an unfavorable economic manner in order to permit the competing gas utilities to operate in what they deem to be the most economic manner from their standpoint, thus imposing added economic burdens upon electric consumers for the benefit of gas consumers and unfairly discriminating against the former; nor (3) any administrative procedures which deny to the parties, despite their timely request, all opportunity to meet and rebut outside-of-the-record material that is so relied upon and utilized in reaching administrative determinations at the very heart or center of the controversy; nor (4) any federal administrative decision which unnecessarily frustrates state and local policies designed to alleviate air pollution and which are not incompatible with any federal policy or provision in the Natural Gas Act but which, in fact, are encouraged and supported by other agencies of the federal government and by federal laws; nor (5) an administrative decision which misapplies the statutory standards of the Natural Gas Act and is in conflict with the policies thereof as heretofore established by this Court; nor (6) any judicial decision which sanctions such policies and procedures of an administrative agency.

All of such results are effected by the actions of the Commission and the Court below in the case at bar. So long as such actions go unreversed, they must be expected to continue to have a significant adverse effect upon the existing legal rights of the petitioner and to be utilized in the future

as a precedent that could be expected to undermine the integrity of the entire administrative process.

WHAT THE COMMISSION DID

With this background regarding the results of the Commission action, let us review in detail what the Commission erroneously did which achieved such unfortunate results for southern California electricity users.

1. The Commission Flagrantly Violated Its Own Rules Of Practice and Procedure and the Administrative Procedures Act and Denied Edison A Fair Hearing.

The Commission, in relying on material outside the record without allowing the parties opportunity to meet and rebut it, or otherwise respond thereto, has violated the requirements of both its own Rules of Practice and Procedure (§ 1.26(d)) and the Administrative Procedures Act (Sec. 7(c) and (d)), denied Edison the fair hearing required by the Natural Gas Act (Sec. 7(c)) and unlawfully deprived it of its property without due process of law in violation of the Constitution of the United States (Amend. V).

The Commission reversed the decision of its Presiding Examiner which was based on the record and, in so doing, demonstrably relied upon material outside the record; it placed its principal reliance upon a complicated off-the-record study (which included admitted errors) of the comparative cost of the alternative supply arrangements involved in the proceeding. The Commission further refused Edison's timely request to be permitted to meet and rebut the off-the-record material, contrary to the unequivocal requirements of the Commission's own Rules of Practice and Procedure and of the Administrative Procedures Act. This is a clear violation of the basic requirements of a fair hearing in administrative proceedings. As stated by Professor Davis in his Administrative Law Treatise:

"The basic principle is that parties should have opportunity to meet in the appropriate fashion all materials that influence decision. Nothing short of opportunity for cross examination and presentation of rebuttal evidence is appropriate for disputed adjudicative facts at the center of the controversy". (2 Davis Administrative Law Treatise, page 403-404).

Better illustrations of the violations of this basic principle could hardly be imagined than those provided by the case at bar.[9]

(a) In reaching its decision, the Commission relied upon a number of reports and studies made by Congressional Committees and others which were nowhere presented in the record and which bore dates subsequent to the close of the record, and denied all opportuntiy to cross-examine or to present rebuttal testimony, even though Edison made timely request to do so in its petition for rehearing to the Commission.[10]

---

[9] See *Ohio Bell Telephone Co. v. PUC*, 301 US 292 (1937); *Market Street Railway v. Railroad Comm.*, 324 US 548 (1945); Davis, Adm. Law Treatise, Vol. 2, p. 418; see also annotation "Administrative decision or findings based on evidence secured outside of hearing, and without presence of interested party or counsel," 18 ALR 2d 552 et seq.).

[10] Such reports referred to by the Commission included: "The Adequacy of Technology for Pollution Abatement," a report of the Research Management Advisory Panel (Subcommittee on Science and Astronautics, U.S. House of Representatives, 89th Cong. 2d (1966)) [R. 68839, Jt. App., p. 757]; "Waste Management and Control", a Report to the Federal Council for Science and Technology by the Committee on Air Pollution of the National Academy of Sciences and the National Research Council (1966), pp. 165-166 [R. 68841, Jt. App., p. 759]; Hearings Senate Subcommittee on Public Works, Committee on Appropriations, June 13, 1966, presentation of the Administrator of the Bonneville Power Administration, report of House of Representatives, Public Works for 1967, Part 2, p. 498 [R. 68850, Jt. App., p. 768]; "Comparison of Coal-Fired and Nuclear Power Plants for the TVA System", Office of Power, Tennessee Valley Authority, Chattanooga, Tennessee, June 1966 [R. 68854, Jt. App., p. 772]; and Hearings, Senate Subcommittee on Public Works, supra, and Hearings, House Subcommittee on Appropriations, supra [R. 68854, Jt. App., p. 772]. See Edison's Petition to the Commission for Rehearing, R. 68991, Jt. App. p. 901.

As stated in the Dissent to Opinion No. 500-A (R. 69330, Jt. App., p. 1073):

"The extent to which the majority relied on these reports in making its determination to certificate a short-term supply is evidenced in its discussion of remote mine-mouth generation and extra high voltage transmission (EHV) in the initial opinion. It said regarding EHV and the West Coast Intertie, 'One 835-mile line is scheduled to be energized in 1969 and the second in 1971.' For this proposition it cited, 'Hearings Senate Subcommittee on Public Works, Committee on Appropriations, June 13, 1966.' It is not coincidental that the apparent availability of these sources of energy by 1969 and 1971 coincides with the time TSP[11] will require more gas. This report obviously had an influential effect on the majority in its decisional process, yet the report deals with such speculative issues as timing, energy, and availability which the protesting parties could not inquire into. Nor was this an isolated instance. Further, in the initial opinion, the majority refers to a study introduced by Pacific Lighting pertaining to production of electrical energy in southern California by nuclear plants. This study was attacked in the hearing by Gulf Pacific as being too optimistic. Nevertheless, the majority, having the advantage of a report entitled, 'Comparison of Coal-fired and Nuclear Power Plants for the TVA System', published in June 1966 by the Tennessee Valley Authority, stated, 'Whatever merits Gulf Pacific's position may have had in 1964 when testimony on this subject was taken, it now appears that nuclear generation is meeting this economic test.' [R. 68853, Jt. App., p. 771] [Our emphasis added]. Of course, since the TVA report was outside the record it could

[11] TSP refers to the so-called Tailored Supply Program of Pacific Lighting which was adopted by the Commission.

not be questioned or looked into by the protesting parties. Furthermore, in the highly contested matter of air pollution, two recently published reports were relied upon by the Commission without the parties having the opportunity to cross examine or introduce additional or counterbalancing evidence. The dictates of a fair hearing would seem to require that they be able to meet them in some manner. On this point I would refer to Davis, Administrative Law Treatise, Vol. 2, 'Our thesis is that the reconciliation can best be accomplished by recognizing that the cardinal principle of fair hearing is not that all facts should be in the record or that all facts should be subject to cross-examination, **but rather that parties should have opportunity to meet in the appropriate fashion any materials that influence decision.**' (emphasis added). Thus, I cannot look upon a 'timely request' so lightly as the majority and would allow an opportunity for the protesting parties to respond to these documents which were obviously relied upon heavily by the majority in its decision to certificate TSP rather than the often promised, but never granted, long-term supply of natural gas."

(b) The very foundation of the Commission's decision (Opinion No. 500) was a comparative cost analysis on the basis of which the Commission made specific findings (R. 68869, 68880, Jt. App., pp. 787, 798) but which was also outside the record and as to which no opportunity to cross examine, rebut, or prove to the contrary ever has been granted.[12] The Commission's analysis in this case was based

[12] The Commission itself emphasized (Op. 500, R. 68865, Jt. App., p. 783) that in this very case cost considerations played a major and perhaps decisive role. In Opinion 500-A, the Commission (at R. 69322, Jt. App., p. 1065) makes it clear beyond question that the comparative cost study of Appendix B to Opinion No. 500 (R. 68895, et seq., Jt. App., pp. 813, et seq.) was the very touchstone of its cost findings (R. 68869, Jt. App., p. 787), and of its ultimate determination. Indeed, the Gas Balance which belatedly appeared in the Ap-

upon a gas balance study (such gas balance studies are designed to determine which combination of alternative, available gas supplies will meet the market requirements at the lowest cost) involving complex assumptions and complicated computations that were not disclosed at any time before the Commission's decision denying rehearing. That this was the procedure followed has really nowhere been denied. Rather, the Commission attempted to justify it, in its brief to the lower Court (p. 22), upon the grounds of alleged "expertise" and on a purported reliance upon the *Market Street Railway* case, 324 U.S. 548 (1945). In contrast to the facts in the case at bar, this Court, in that case in which the outside-the-record material utilized by the Commission was material which the Market Street Railway Company's own employees had prepared, consisting of its own reports, pointed out:

> "No contention is made here that the information was erroneous or was misunderstood by the Commission, and no contention is made that the Company could have disproved it or explained away its effect for the purpose for which the Commission used it . . . It does not appear that the Company was in any way preju-

---

pendix to Opinion 500-A (R. 69333-8, Jt. App., pp. 1076-81) is the true determinant of the cost and market findings the Commission made. The unit rate of the gas proposed to be purchased by Pacific Lighting under the El Paso and Transwestern applications declines as the contract volume increases, and total cost reflects the unit rate and annual purchase load factor. Thus, if the contract volume level of Pacific Lighting purchases can be increased "With Gulf Pacific" as well as without, the incremental savings cited by the Commission are realized in either case, provided satisfactory load factors can be achieved. The final cost result reflects the contract volume selected to be purchased, the timing of any increases in contract volume, and the balancing of these basic relatively constant volumes against widely fluctuating requirements by employing the available load balancing tools of storage, seasonal and emergency gas, variations in daily purchase volumes, and curtailment of interruptible customers. As even a cursory inspection of the gas balance material shows, it is an intricate and complex technical study frequently, if not usually, accomplished by computer operations.

diced thereby, and it makes no showing that, if a rehearing were held to introduce its own reports, it would gain much by cross-examination, rebuttal, or impeachment of its own auditors or the reports they had filed." (324 U.S. 548, 561-2). (our emphasis)

That the contrary is true in the case at bar is demonstrated by Edison's "Revision of the Commission's Gas Balance Study to Correct Defects" (Appendix D hereto) which Edison presented to the Court of Appeals to indicate the kind of evidence which could have been presented to the Commission in refutation of its study. Even when using the same principal assumptions used by the Commission,[13] Edison's revision of the Commission's gas balance "With Gulf Pacific" (the proposal supported by Edison) for the Commission's test year 1970 shows an average cost of gas to the market which is 0.86 cents per Mcf less than with the Commission's gas balance "Without Gulf Pacific" (the proposal adopted by the Commission). In total dollars this represents more than $10 million less cost per year "With Gulf Pacific" than "Without Gulf Pacific", when applied to the potential gas market found by the Commission.

This Court, in the *Market Street Railway* case, went on to say:

> Due process, of course, requires that commissions proceed upon matters in evidence and that parties have opportunity to subject evidence to the test of cross-examination and rebuttal. But due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of the parties."

---

[13] Such revised study utilized the same storage facilities, the same basic supplies available and the same unit prices for volumes purchased from out of state. It then merely corrected for an admitted error and reflected efficient utilization of the same storage facilities and available gas supplies.

Nobody in the case at bar has contended, nor could anyone, that more than $10 million less annual cost "With Gulf Pacific" is not substantial.

A much closer parallel to the factual and procedural situation in the case at bar is that which was involved in *Ohio Bell Telephone Company v. PUC*, 301 U.S. 292 (1937) where this Court, in a unanimous decision written by Mr. Justice Cardozo, reversed a rate order because of the Commission's having gone outside the record in fixing property values for rate-making purposes, and stated:

> "Without warning or even the hint of warning that the case would be considered or determined upon any other basis than the evidence submitted, the Commission cut down the values for the years after the date certain upon the strength of information secretly collected and never yet disclosed. The company protested. It asked disclosure of the documents indicative of price trends, and an opportunity to examine them, to analyze them, to explain and to rebut them. The response was a curt refusal. Upon the strength of these unknown documents refunds have been ordered for sums mounting into millions, the Commission reporting its conclusion, but not the underlying proofs. The putative debtor does not know the proofs today. This is not the fair hearing essential to due process. It is condemnation without trial." (301 US 292, 300).

As to the claimed "expertise" of the Commission in the case at bar, it is also pertinent to point out that reliance of the Court in the *Market Street Railway* case was placed upon the fact that there the state Commission was "so experienced . . . with the affairs of [the] particular appellant" (324 U.S. 548, 560); such justification for the Commission's actions does not exist here, for neither the FPC nor its Staff is so "experienced with the affairs" of Pacific Lighting, a distribution system *not* subject to its

jurisdiction, with whom it has come into contact upon supply issues only occasionally, and whose load balancing operations and economic behavior differ materially from natural gas transmission systems (c.f., *El Paso Natural Gas Co.* G-12580, 22 FPC 900, 903).

As one demonstration of the Commission's lack of expertise in this regard, we would respectfully urge the Court to consider this fact: the Commission's gas balance study "Without Gulf Pacific", which was disclosed for the first time in the Commission's decision denying rehearing (Opinion No. 500-A, R. 69333-38, Jt.App. pp. 1076-81), postulates gas storage operations which force the Pacific Lighting system into the winter peak heating season with a zero gas storage balance at that time of need. The occurrence of a severe peak in December or early January could literally mean disaster from the standpoint of those distributing companies' operations. No one has claimed, and no one with any expertise could claim, that the Pacific Lighting system could be operated this way, for it would violate every principle of sound management of a gas distributing company. The Commission's response before the lower Court to this glaring deficiency, while admitting its existence, was that they would simply buy some more gas (Comm. Br. to CA for 3rd Cir., p. 25). There is no doubt that this is what they would have to do. But what does this mean? It means that the Commission, in its study, has tested the comparative economics of the situation "Without Gulf Pacific" by employing a supply which admittedly does not meet the market requirements. The recognized fact that they would have to buy more gas would result in a higher level of service, which the Commission itself had determined would produce higher costs. (Op. 500, R. 68847-8, Jt. App., pp. 765-6). And so it has tested the economics of the situation admittedly without a consideration of all of the cost factors which would necessarily be involved. The recognized necessity of buying more gas

would obviously require the construction of a completely new study and a completely new gas balance to make any correct determination of the cost of gas at the load center and of the most economic supply combinations to meet at least the minimum requirements. Such a new study, to be sound, would have to consider the total energy costs which the Commission demonstrably failed to consider. Although the Commission's study admittedly contained these defects, Edison has been denied the right to cross-examine or to rebut it.

It is the avoidance of errors such as these that the provisions of both the Administrative Procedures Act and the Commission's own Rules of Practice and Procedure, providing the parties opportunity to meet and rebut such material, are designed to prevent (see pp. 32-37, *infra*). A better illustration of the wisdom of the rules and of the denial of a fair hearing, from failing to follow them, could, we submit, hardly be imagined.

2. The Commission Frustrated Local Police Regulations Designed To Alleviate Air Pollution Which Involved No Conflict With National Air Pollution Policies And No Conflict With the Policies of The Natural Gas Act As Heretofore Construed By This Court And In So Doing Exceeded Its Jurisdiction.

The Commission, in denying the Gulf Pacific Application (which the record showed met all of the traditional tests of public convenience and necessity)[14] and certificating the El Paso and Transwestern applications, made a determination that the requirements and desires of the air pollution control authorities and the public in southern California, for the substitution of gas fuel for fuel oil in

[14] i.e., adequacy of supply and market, economic feasibility and ability to finance. See *re Kansas Pipeline and Gas Company, et al.* 2 FPC 29 (1939); *re Houston Texas Gas and Oil Corp., et al.* 16 FPC 118, 122 (1956). (Op. 500, R. 68829-31, 68873, 68881-2, Jt. App., pp. 747-9, 791, 799-800, reflect evidence that the Gulf Pacific Project met traditional tests of public convenience and necessity.)

electric generating plants in that area, would not, in the FPC's view have an appreciable effect upon air pollution control,[15] in spite of the determinations of the local air pollution control authorities to the contrary[16] and in spite of its own previous recognition that "the state and local agencies . . . . have the best knowledge of the smog problems" and that the FPC should not "pre-empt the expertise of the California authorities" (*re El Paso Natural Gas Co.* 22 FPC 900, 903). In this case, the Commission did effectively pre-empt the expertise of the California authorities and create a serious conflict between its policy position and that of the local regulatory authorities and did so because of its conclusion, based upon its cost study that did not reflect all the costs, that it would be more economical (*supra*, pp. 19 and 20).

There is no such conflict between national air pollution policy or the federal agencies directly responsible therefor, such as the Department of Health, Education and Welfare and local authorities, but, rather, the announced federal policies relating to air pollution and policy actions of the federal executive department and enactments of the Congress support the aims and objectives of the local authorities involved (see *infra*, pp. 22-4). A resolution of the conflict created in this case between the pre-emptive actions by the FPC on the one hand and the air pollution control policies of the federal executive and legislative branches and the local air pollution control authorities on the other hand is urgently needed to enable those caught on the horns of the dilemma thereby created to resolve the resulting problems and to eliminate the cross-currents of administrative jurisdiction and control which, until resolved, can only tend to hinder consummation of the national policies on air pollution.

---

[15] Opinion No. 500 R. 68839, Jt. App., p. 757.

[16] Griswold, R. 422-3, Jt. App., pp. 17-18; Rules 62 and 62.1 of APCD, Ex. 45, R. 29582-3, Jt. App., pp. 235-6.

This FPC created conflict seems clearly in violation of decisions of this Court as well as the policy pronouncements and legislative enactments of the federal government.[17] It is well established that the Constitution, in conferring upon Congress the regulation of commerce, never intended to prevent the states from legislating upon all subjects relating to the health, life and safety of their citizens.[18] In *Welch Co. v. New Hampshire*, 306 U.S. 79 (1939), this Court stated:

> "Plainly Congress by mere grant of power to the Interstate Commerce Commission did not intend to supersede state police regulations established for the protection of the public using state highways." (306 U.S. 79, 85).

and in *Huron Cement Co. v. Detroit*[19] this Court stated:

> "Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously know as the police power." (362 U.S. 440, 442).

In the absence of conflict or incompatibility of such local police regulations dealing with air pollution with some clearly defined policy of the Federal Government, the regulations and their objectives are entitled to full recognition and support and should not be frustrated by any action of the FPC.

The clearly defined policy of the federal government supports such local air pollution control regulations. As stated by this Court in the *Huron* case, *supra*, at page 445:

---

[17] Clean Air Act of 1963, Public Law 88-206; Air Quality Act of 1967, Public Law 90-148, discussed *infra*. See also Executive Order 11282 dated May 26, 1966 relating to restrictions on governmental installations similar to those in Los Angeles County and Title 42 C.F.R. Part 76 issued June 2, 1966 (31 F.R. 7902, June 3, 1966) and Mar. 17, 1967 (32 F.R. 4415, Mar. 23, 1967).

[18] As disclosed in this record, the APCD has been most successful in defending its position in such circumstances; cf., *People v. Plywood Mfrs. of Cal., etc.*, 137 CA2; 859, 291 P.2d 587 (1955).

[19] *Huron Cement Co. v. Detroit*, 361 U.S. 440 (1960).

"By contrast, the sole aim of the Detroit ordinance is the elimination of air pollution to protect the health and enhance the cleanliness of the local community. Congress recently recognized the importance and legitimacy of such a purpose, when in 1955 it provided:

> "'[I]n recognition of the dangers to the public health and welfare, injury to agricultural crops and livestock, damage to and deterioration of property, and hazards to air and ground transportation, from air pollution, it is hereby declared to be the policy of Congress to preserve and protect the primary responsibilities and rights of the states and local governments in controlling air pollution, to support and aid technical research to devise and develop methods of abating such pollution, and to provide Federal technical services and financial aid to State and local government air pollution control agencies and other public or private agencies and institutions in the formulation and execution of their air pollution abatement research programs'. 69 Stat. 322; 42 U.S.C. § 1857.[20]

"Congressional recognition that the problem of air pollution is peculiarly a matter of state and local concern is manifest in this legislation. Such recognition is underlined in the Senate Committee Report:

> "'The committee recognizes that it is the primary responsibility of State and local governments to prevent air pollution. The bill does not propose any exercise of police power by the Federal Government and no provision in it invades the sovereignty of States, counties or cities.' S. Rep. No. 389, 84th Cong., 1st Sess. 3."

This compatible and supportive Federal Policy has been further supplemented by the Clean Air Act adopted December 17, 1963, (Public Law 88-206, 88th Cong., H. R. 6518) which contains, among other things, Section 2(b) reading:

---

[20] This reference is to the act formerly known as the "Clean Air Act" adopted on July 14, 1955, and now known as "An act to provide for air pollution prevention and control activities of the Department of Health, Education and Welfare and for other purposes".

"The Secretary shall cooperate with and encourage cooperative activities by all Federal departments and agencies having functions relating to the prevention and control of air pollution, so as to assure the utilization in the Federal air pollution control program of all appropriate and available facilities and resources within the Federal Government".

More recently (in fact, last year) the Congress enacted the Air Quality Act of 1967 (Public Law 90-148, 81 Stat. 485) reiterating a national policy to encourage and not to displace action by local agencies to abate air pollution. (Section 108(b) and Sec. 109).

3. The Commission Arbitrarily Changed the Ground Rules which it had Previously Established as Justification for Its Delay In Processing the Gulf Pacific Application.

The processing of the Gulf Pacific application, filed February 12, 1963, was delayed and deferred by the Commission for the asserted reason that it desired to institute a comparative proceeding "to determine how the long-term needs for natural gas deliveries to Southern California may be met in the manner which is most desirable from the standpoint of the public interest" (*El Paso Natural Gas Company* Docket G-16235, 30 FPC 77, 92). After having instituted a proceeding on that basis, and for that asserted purpose, which resulted in delaying the commencement of the hearing on the Gulf Pacific application a full 16 months (in violation of both the Natural Gas Act and the Administrative Procedures Act), and then consuming another 25 months for hearing and briefing,[21] the Commis-

[21] The early procedural background helps to place in perspective the arbitrary actions of the Commission in this respect. Despite the mandatory language of both the Natural Gas Act ("shall set the matter for hearing," Sec. 7 (c), 15 U.S.C. 717f(c)), the Administrative Procedure Act ("shall proceed with reasonable dispatch to conclude any matter," Sec. 6(a), App. B, p. 11a) and the Commission's own Regulations (18 CFR 157.11), the setting for hearing was delayed deliberately to attempt to induce competitive applications (see App. C, pp. 15a-16a). The Commission was faced with its Regulation 157.11, providing that when an application is filed less

sion arbitrarily refused, in its Opinion and Order, to compare and analyze the alternative proposals before it on the comparative basis upon which the proceeding was ordered, thereby denying to Edison and the other proponents of the Gulf Pacific Project any true comparative hearing (c.f. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945)).

That off-the-record study, on which the Commission based its cost conclusions, was, aside from its other procedural and substantive defects, a one-year study purportedly covering the year 1970, but using 1968 levels of gas supply to the market, which it conceded to be grossly inadequate.[22] This was the basic economic "evidence" considered by the Commission (Op. 500, R. 68869, Jt. App., p. 787; Edison Petition to Commission for Rehearing, pp. 48-51, Exh. C to Petition for Review, pp. 51a, et seq.; Op.

---

than fifteen days before the commencement of a hearing on a pending application and seeks authority to serve some or all of the markets sought in such pending application, or is otherwise competitive therewith, the new application shall not be set for hearing, in the absence of special findings (nowhere made in this case), until a final Commission decision on the pending application. The Commission lacked the power to compel competitive filings; it improvised the purported alternative of issuing invitations, and providing ample time for filing. The Commission ultimately went farther, and accepted the month late filing of what El Paso called an "amendment" to its application, but was in reality a totally new and different proposal offered as an alternative (R. 68827, Jt. App., p. 745; see protests of Gulf Pacific, R. 65663-675, Jt. App., pp. 583-95, Edison, R. 65681-2, Jt. App., pp. 596-7, Humble, R. 65708-713, Jt. App., pp. 600-5). Such action was clearly prejudicial to the Gulf Pacific proponents and was objected to by them. (See Motion for Order Giving Public Notice and Request for Early Hearing, filed June 7, 1963, R. 55204-210, Jt. App., pp. 468-74, Motion for Prompt Consolidated Hearing of CP63-204 and CP63-223, filed June 21, 1963, R. 55252-266, Jt. App., pp. 475-89, Motion to Expedite Procedure, filed August 2, 1963, R. 55349-361, Jt. App., pp. 490-502. See Appendix C for a more complete chronological statement of the proceedings). Time is of the essence to producers who can realize no revenues from substantial investments in gas properties until the gas begins to flow. As the Commission was well aware, delay alone can defeat a new pipeline project.

[22] Commission Brief to Court of Appeals for the Third Circuit, p. 25.

500A, R. 69323-4, Jt. App., pp. 1066-7) in a proceeding which it well in advance had "advertised" as one in which it would determine "how the long-term needs for natural gas deliveries to Southern California may be met in the manner which is most desirable from the standpoint of the public interest". (Emphasis added). (Re *El Paso Natural Gas Company*, FPC Docket No. G-16235, 30 FPC 77, 92).

The Commission's determination in its decision which followed (based upon its asserted "objective" review of the long term and upon its "knowledge" external to the record) that "flexibility", which avoids the making of commitments necessary to any long-term solution, was to be the governing criteria was tantamount to an arbitrary abandonment of any long-term solution, and constituted a reversal of the ground rules previously laid down by it as the reason for its extensively delaying the processing the Gulf Pacific application and for ordering a comparative hearing. Certainly, as a short-term solution, the Tailored Supply Program (TSP) sponsored by the gas companies and adopted by the Commission is not mutually exclusive with the long-term solution provided by the Gulf Pacific Project, and such comparison is thus not proper for a comparative hearing.[23] (C.f., *Ashbacker*, 326 U.S. 327, *supra.*) The Commission in its opinion and order doesn't even make a finding of mutual exclusivity. As pointed out in

[23] The inadequacies of the TSP to meet even the short-term gas supply needs of the area is well evidenced by the fact that already El Paso has filed a new application to increase its gas deliveries to southern California by some 154 million cubic feet per day commencing November 1, 1967, less than a year after the increased deliveries under the certificate granted in the Order accompanying Opinion No. 500 were to be effective. (FPC Docket CP67-217.) A similar application for an additional increment (110 million cubic feet per day) was subsequently filed with deliveries to commence November 1, 1968 by Transwestern. (FPC Docket CP68-181). Nor could the Commission itself be deemed unaware of the inadequacy of the TSP. Its own gas balance (R. 69338, Jt. App., p. 1081) "Without Gulf Pacific" reflects total market curtailments in 1970 of 203,156 Mcf, a shortage almost equal to the total TSP volumes.

the Dissent: "There is no finding that additional supplies beyond 1968 are not necessary. There is no finding that El Paso expanded is not required. Neither is there a finding on a comparative basis as to why Gulf Pacific must be denied." (R. 68904, Jt. App., p. 822). This arbitrary reversal, after the conclusion of the hearing, of the ground rules which were theretofore used by the Commission as a basis for delaying the prompt processing of the Gulf Pacific Project, constitutes a denial to Edison of a prompt and fair hearing as required by Section 6(a) of the Administrative Procedures Act[34] and of due process of law. (C.f., 18 C.F.R. § 157.11, App. B hereto, pp. 13a-14a).

4. The Commission Unlawfully Applied The Provisions Of The Natural Gas Act And In So Doing Exceeded Its Authority.

(a) The Commission Applied Improper Standards Of Public Convenience And Necessity.

While assuming that there would be adequate future supplies of gas available to serve the needs of the California market and that there would be no future problems with respect to gas acquisition and supply (R. 68841, Jt. App., p. 759), the Commission applied improper standards of public convenience and necessity[35] and in so doing exceeded its statutory authority by denying to the southern California public a higher level of gas service, which the record shows it wanted and was willing to pay for[36], simply

---

[34] App. B. hereto, pp. 10a-11a.

[35] It did not question the fact that Gulf Pacific met the traditional requirements of public convenience and necessity (i.e., adequacy of supply and market, economic feasibility and ability to finance — see re *Kansas Pipeline and Gas Company*, et al., 2 FPC 29 (1939); re *Houston Texas Gas & Oil Corp.*, et al., 16 FPC 118, 122 (1956)).

[36] The willingness of the public in southern California to pay for measures designated to eliminate possible contributing sources of air pollution is reflected in the evidence. Industry in Los Angeles County has expended nearly $108 million for air pollution control equipment

because the Commission did not agree with the public's desires (or the reasons therefor) for increases in the level of gas service to the area. In so doing, the Commission made no finding and expressed no determination that the satisfaction of the public's insistent demands in this regard would deprive other areas of adequate gas service. The denial of the Gulf Pacific Project (which the record showed without dispute would provide for substantially less burning of fuel oil and a higher level of gas service in the area in accordance with the public's demands — Exs. 639-640, R. 35979-82, Jt.App., pp. 364-7; Proctor, R. 18156, 18163, Jt. App., pp. 131-2) for such a reason, involves a misinterpretation and an arbitrary, capricious and unlawful application of the statutory standard of public convenience and necessity. (Cf., re *Kansas Pipeline & Gas Co.*, 2 FPC 29, 56; *Union Pacific R. Co. v. Public Service Comm.*, 103 Utah 459, 135 P(2d) 915, 918.). It is no different in this respect than would be an administrative determination in Washington that the people of southern California who prefer to enjoy total electric living should be deprived of the opportunity to do so because of a determination that in some applications the burning of gas, coal, wood, or old rubber tires, would be cheaper or would assist the economics of the businesses of those engaged in such sales.

---

which is largely non-productive, APCD has banned almost 2 million incinerators whose capital investment was estimated to be $40 million, and established in place of them an area-wide rubbish collection system that cost the taxpayers $30 million a year; the reason was to eliminate air contaminant emissions which were not large in terms of percentage of total tons of emission (e.g., R. 422-3, Jt. App., pp. 17-18; cf., Ex. 41, pp. 85-6, 88-97, 114-121, R. 29340-41, 29343-52, 29369-76, Jt. App., pp. 213-232). Furthermore, since 1956 Edison alone has expended more than $3,500,000 in research efforts to search out means of eliminating contaminants from the burning of fuel oil (e.g., Ex. 41, p. 89, R. 29344, Jt. App., p. 216). These expenditures are clearly reflective of both the seriousness of the problem and the earnestness with which those who are directly affected are searching out feasible solutions.

(b) The Commission Unlawfully Applied The Provisions Of The Natural Gas Act Relating To Direct Industrial Sales.

The Commission erroneously interpreted the exemption for direct sales to be limited to situations in which direct sales are "a useful adjunct to the normal operational pattern of interstate pipelines" (R. 68881, Jt.App., p. 799). This restrictive interpretation of Section 1(b) (see App. B, p. 5a) of the Natural Gas Act is nowhere to be found in the Act, is without authority in law, and is contrary to the intent of the law.

As stated in the dissenting opinion, "Such a decision flies in the face of the Congressional mandate exempting direct sales from Commission jurisdiction" (R. 68956, Jt.App., p. 874).[27] The effect of the Commission's attempt so to exceed its statutory authority by denying a certificate to Gulf Pacific is to deny to Edison the benefits of, and property rights in its contracts underlying the Gulf Pacific Project without due process of law.

In Opinion No. 500-A (R. 69324, Jt.App., p. 1067), the Commission purports to explain away its aforesaid statement from Opinion No. 500 regarding direct industrial sales as being directed at the nature of Gulf Pacific's proposed operation as an exclusively industrial pipeline,[28] and not at direct sales as such, but then goes on to refer to other cases where the Commission had certificated pipelines which do not make sales for resale[29] "where the particular

[27] Cf., *Federal Power Commission v. Transcontinental Pipeline Corp.*, 365 U.S. 1 (1961); Re *Natural Gas Pipeline Co. of America*, FPC Docket No. CP 62-243, et al., Opinion No. 474 issued September 9, 1965, 34 FPC 771.

[28] Furthermore, treatment of Gulf Pacific as exclusively industrial in its operations is in conflict with the Commission's sanction as recently as last year in other proceedings of commingling gas in the same pipeline without destroying the non-jurisdictional character of the direct sale (see *Florida Gas Transmission Corp.*, FPC Docket CP65-393, Op. No. 516 issued March 1, 1967).

[29] Citing cases referred to in footnote 1, p. 10 of Op. No. 500-A, R. 69324, Jt. App., p. 1067.

circumstances indicated that such operations would not adversely affect other gas customers in the area served."[20] The circumstance that the Commission may have properly applied the standard of the Natural Gas Act in other cases, of course, does not constitute an adequate answer to the charge that it improperly applied the law in this case nor does it justify the application in this case of an erroneous standard.

WHAT THE COMMISSION DID NOT DO

5. The Commission Failed, Or Refused, After Determining To Certificate The El Paso And Transwestern Proposals, To So Condition Such Certificates As to Protect The Constitutional Rights of Edison In Spite Of Timely Request By Edison For Such A Condition.

After making its determination that the substitution of gas for conventional fuel oil in electric generation would not significantly contribute to air pollution control (R. 68839, Jt. App., p. 757) the Commission concluded that economics should be the controlling consideration (R. 68865, Jt. App., p. 783), but thereafter arbitrarily refused to condition its certificate, in an appropriate way, which would permit the electric utilities to operate in the most economical manner from their standpoint. It thereby unlawfully discriminated against Edison and its electric customers and effected a denial of due process of law. This result necessarily follows because the effect of the local air pollution legislation is to require the electric utilities to burn all the gas that is made available to them by the Pacific Lighting gas distributors even when there is available for use in electric generation lower cost conventional fuel oil. It was unquestioned in this record that the optimum level of service of the so-called Tailored Supply Program (TSP), adopted by the Commission, was

[20] As found by the Examiner (R. 66629-31, Jt. App., pp. 674-6) the record showed that operations of the Gulf Pacific Project would not adversely affect other gas customers in the area served.

designed by Pacific Lighting to effect the most economical level of service from the standpoint of the gas companies (R. 68847-8, Jt. App., pp. 765-6). It was also established and unchallenged in the record that such level of service imposes added cost burdens upon the electric utilities (cf., R. 69322, Jt. App., p. 1065) and is not the most economical level from their standpoint (c.f., Dissent to Op. 500, R. 68942-3, Jt. App., pp. 860-1).

It is respectfully submitted that, under such conditions and so long as economics are deemed to be the controlling criteria, the only way in which the interests of Edison and its customers can be afforded due process, in such a case, is for the Commission's order to contain a condition which would provide that such gas could not be made available by the gas companies to the electric utilities for electric generation when there were cheaper alternatives available to the electric utilities. Under such circumstances, the inclusion of such a condition is necessary to provide equal protection and due process, and cannot be discretionary with the Commission.

WHAT THE COURT OF APPEALS DID

At the outset, in view of the Court of Appeals having taken occasion in its opinion to make reference to the circumstances that Humble Oil & Refining Company and other producers have terminated their gas supply contracts and that Gulf Pacific Pipeline Company has now been dissolved, we feel constrained to point out to this Court the fact that it was previously determined by the Court of Appeals, following motions to dismiss and full argument thereon, that such circumstances do not render the case moot (Order of Court of Appeals dated Sept. 29, 1967 on Intervenors' Motion to Dismiss) and that it did not in its decision overrule its determination in this respect, as indeed it could not have properly done.[21] We have in-

[21] Reference is also made to Edison's Answers to Motions to Dismiss in record certified to this Court.

cluded in Appendix E, a brief summary of the sound bases for such determination under the principles established by *City of Pittsburgh vs. FPC*, 237 F(2d) 741 (1956), *Scenic Hudson Preservation Conf. v. FPC*, 354 F(2d) 608 (1965), cert. den., 384 US 941, and *Montana-Dakota Utilities v. FPC*, 169 F(2d) 392, 399 (1948) and an example of the appropriate relief which could now be granted to petitioner and which is sought by it.

The Court of Appeals Erred in Concluding that the Commission's Orders Were Rationally Based, Supported by the Record and Reached by Procedures Required by Law.

After reciting that the critical questions, in its view, were whether the Commission's order "was rationally based, supported by the record, and reached by procedures required by law", the Court of Appeals really did no more than announce its conclusion that on reviewing the record, "the questions compel answers in the affirmative" and did not provide any meaningful disclosure of what in the record or otherwise it felt compelled it to reach such conclusion. (Court of Appeals Opinion, filed December 21, 1967 in No. 16434, App. A hereto, pp. 2a-3a.)

According to the Court of Appeals' own recital of its criteria for review, it is clear that all three conditions had to be met in order to justify the Court of Appeals' affirmance of the Commission's decision. Its failure to disclose in any meaningful way the basis of its conclusion leaves everyone in the dark as to just how the Court of Appeals reached such conclusion. However, it is clear that it did err in its conclusion that the conditions were met.

1. The Court Of Appeals' Conclusion That The Commission's Order Was Rationally Based Contained an Inherent Ambiguity And Was Erroneous Upon All Alternative Interpretations.

In support of its action, the Court of Appeals stated: "Once the existence of a rational basis for the Commis-

sion's action is ascertained the reviewing power is estopped from further consideration of the Commission's action." (our emphasis). In doing so, the Court of Appeals created an inherent ambiguity which it declined to clarify when called to its attention by Edison's Petition for Rehearing. This Court's attention is respectfully directed to the fact that such statement of the Court of Appeals is subject to two very different interpretations, namely: (1) that the Court of Appeals concluded that the same basis which the Commission used was rational, or (2) that the Court of Appeals concluded that a basis different from that used by the Commission could rationally support the result. The refusal of the Court of Appeals to clarify this inherent ambiguity demonstrates that it assumed that it could properly affirm the Commission on either basis. In this, the Court of Appeals was demonstrably in error:

(a) If the Court of Appeals affirmed the Commission on some basis different from that relied upon by the Commission, which the Court of Appeals viewed as rational, it has clearly and erroneously exceeded its appellate jurisdiction. Such ruling would be in direct conflict with the decisions of this Court (*Sunray Mid-Continent Oil Co. v. FPC*, 353 U.S., 944 (1957); *S.E.C. vs. Chenery Corp.*, 318 U.S. 80 (1943); see also *FPC vs. Idaho Power Co.*, 344 U.S. 17 (1952)) and with decisions of other Courts of Appeal concerning the proper review of decisions of administrative agencies, (*Pan American Petroleum Corp. v. FPC*, 376 F(2d) 161, 174 (1967)). These cases hold that once it is determined by a reviewing court that the basis relied on by the regulatory agency is unlawful, its inquiry is properly at an end and that the reviewing court cannot properly sustain the action on some different basis. Neither of the cases cited by the Court of Appeals in its decision supports a contrary view.

(b) On the other hand, if the Court of Appeals affirmed on the same grounds relied upon by the Commission as sup-

port for its determinations, it is demonstrably in error, for the study (its outside-the-record gas balance study), which was the recognized foundation of the Commission's decision (Op. 500, R. 68869, 68880; Jt. App., pp. 787, 798; Edison Petition for Rehearing, Exh. C to Petition For Review, pp. 51a et seq.; Op. 500A, R. 69322-23, Jt. App., pp. 935-8, 1065-6), was not a study upon which the Commission's order could be rationally based:

(i) The Commission's decision was admittedly based upon its own comparative cost study which in turn, was admittedly based upon the Commission's "Gas Balance" (see references in preceding paragraph and Comm. Br. to CA for the 3rd Cir., p. 21), neither of which was ever presented in the record, and neither of which petitioner, despite its timely request, was ever given any opportunity to test by cross-examination or to rebut. Such outside-the-record "Gas Balance Study" of the Commission contained admitted error (Comm. Br. to the CA for the 3rd Cir., pp. 24-5), and concededly postulated gas supplies and storage operations which would force the Pacific Lighting system into the winter peak heating season with a zero gas storage balance "at a time of need" (Comm. Br. to the CA for the 3rd Cir., p. 25). No one claimed, and no one with any expertise could claim, that the Pacific Lighting system could be operated that way.

(ii) The Commission's response, while not denying that its "Gas Balance Study" reflected such zero balance, was that the problem could be resolved by simply buying more gas. However, the Commission had previously determined that the buying of more gas, i.e., a higher level of service, would produce higher costs (R. 68847-48, R. 68879, Jt.App., pp. 765-6, 797), and its comparative economic study did not reflect such higher costs admittedly necessary to provide adequate service and a fair comparison. The result is a purported testing of the economics of the situation ad-

mittedly without a consideration of all of the cost factors which would necessarily be involved. The conceded necessity of buying more gas would obviously require the construction of a completely new study and a completely new gas balance to meet at least the minimum market requirements in order to make any rational determination of the cost of gas at the load center and of the most economic supply combinations.

Before the Court of Appeals, the Commission, while conceding that the computations in its outside-the-record study were both extensive and complicated requiring the application of judgment evaluations (as distinguished from a mere arithmetic arrangement of basic figures), contended that, inasmuch as there were figures as to volumes and costs in the record which were utilized in the study, the study itself was a matter for the exercise of its expertise, relying again upon the *Market Street Railway* case (*supra*, pp. 16 et seq.). If the Court of Appeals decided to sanction the use of such outside-the-record study on such basis, it was clearly in error for there was absolutely no support in the record for the method of operation assumed by the Commission in its study; no opportunity was given to the petitioner to test or contest such assumed method of operation and the Commission conceded in its argument before the Court of Appeals (Com. Br. to the C. A. for the Third Circuit, page 21) that the system could not be so operated without purchasing more gas than was reflected in its study. The costs of such required additional gas were also not reflected in the study (see pp. 19-20, *supra*).

The Court of Appeals obviously could not properly conclude that the orders of the Commission were rationally based upon the same basis as that used by the Commission when such basis was predicated upon a study that was inadequate, incomplete and erroneous.

2. The Court's Conclusion That The Commission's Action Was Supported By The Record And Reached By Procedures Required By Law Is In Error And Sanctions Such A Departure From The Accepted And Usual Course Of Administrative Procedure As To Call For The Exercise Of This Court's Power Of Supervision.

As we have heretofore demonstrated (*supra* pp. 12 et seq.), the decision of the Commission in this proceeding was made in reliance upon materials and studies that were outside of the record, on which its findings on comparative economics were based (R. 68869, 68880, Jt. App., pp. 787, 798) in violation of Sec. 19(b) of the Natural Gas Act (App. B, pp. 8a-9a) and with respect to which the petitioner was denied all opportunity for cross-examination and presentation of rebuttal evidence, despite its timely request that it be permitted so to test and contest the disputed adjudicative facts covered thereby which were at the very center of the controversy.

The Commission's reliance upon such off-the-record studies constituted a patent violation of the Commission's own Rules of Practice and Procedure (§ 1.26(d)), and the Administrative Procedures Act (Sec. 7(d)), both of which require that ". . . any party shall on timely request be afforded an opportunity to show the contrary" when the administrative agency relies on material not appearing in evidence in the record. (See App. B, pp. 12a 14a).

The actions of the Commission also violated the guidelines heretofore recognized in *Ohio Bell Tel. Co. vs. PUC*, 301 U.S. 292, 300 (1936), where this Court, in reversing a rate order because of the Commission's having gone outside of the record in fixing property values for rate-making purposes, stated: "This is not the fair hearing essential to due process. It is condemnation without trial."

If the Court of Appeals' decision constitutes an intended judicial approval of the procedures followed by

the Commission here, under the guise of administrative "discretion" referred to in the Court of Appeals' decision, and if such decision were allowed to stand, it could, we submit, lead to a breakdown of the integrity of administrative justice and procedural due process. We are confident that in the case at bar, as in the past, such denial of a fair hearing essential to due process is of concern to this Court and would not be sanctioned by it and that this Court will invoke its power of supervision. (*Ohio Bell Telephone Co. v. PUC*, 301 US 292, 300).

3. Failure Of Court Of Appeals To Resolve Ambiguity It Created Unlawfully Denied Edison Its Statutory Review.

Failure of the Court of Appeals to disclose the basis relied upon by that Court, particularly after specific request to do so by Edison in its petition to that Court for rehearing, denied to Edison any effective review of the Commission orders as required by Section 19(b) of the Natural Gas Act. Yet in the absence of supporting reasons by the Court, such affirmance of unlawful Commission action could be construed as a precedent supportive of such unlawful action in future administrative proceedings.

When a party, such as Edison here, has a statutory right to a review of administrative agency action, such review should, in fairness, comprise a consideration of and disposition of all the issues raised by the petitioning party and the articulation of the basis for such disposition. (C.f., *FTC v. Standard Oil Co.*, 355 US 396 (1958)). This the Court of Appeals has clearly failed to do and such failure is legal error, resulting in a denial to Edison of its statutory right of appropriate judicial review under Section 19(b) of the Natural Gas Act.

CONCLUSION

We respectfully submit that this case, involving, as it does, a flagrant abuse of the administrative process in dealing with continuing controversies concerning competition for the California gas market, conflicts between the policies of the FPC, and those of federal, state and local air pollution control authorities concerning the use of gas for air pollution control purposes, and the preservation of procedural due process where the vital interests of millions of people have been so cavalierly and unexplainably dealt with and in which the public interest and the integrity of the entire administrative process is so imperiled, merits review by this Court.

We therefore respectfully urge that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

ROLLIN E. WOODBURY
HARRY W. STURGES, JR.
WILLIAM E. MARX

By /s/ WILLIAM E. MARX

Attorneys for Petitioner
Southern California Edison Company

Dated: April 16, 1968

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16,434

SOUTHERN CALIFORNIA EDISON COMPANY,
Petitioner

v.

FEDERAL POWER COMMISSION,
Respondent

EL PASO NATURAL GAS COMPANY AND TRANSWESTERN PIPELINE CO.,
Intervenors

STATE OF NEW MEXICO,
Intervenor

ON PETITION TO REVIEW THE ORDERS OF THE FEDERAL POWER COMMISSION.

Present: STALEY, *Chief Judge*, and KALODNER and FORMAN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of July 26, 1966, as corrected by orders of August 19, 1966 and September 1, 1966, of the Federal Power Commission in this case be, and the same is hereby affirmed.

ATTEST:

THOMAS F. QUINN
Clerk

December 21, 1967

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16,434

SOUTHERN CALIFORNIA EDISON COMPANY,
Petitioner

v.

FEDERAL POWER COMMISSION,
Respondent

EL PASO NATURAL GAS COMPANY AND TRANSWESTERN PIPELINE CO.,
Intervenors

STATE OF NEW MEXICO,
Intervenor

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL POWER COMMISSION.

Argued November 9, 1967

Before STALEY, *Chief Judge*, KALODNER and FORMAN, *Circuit Judges*

OPINION OF THE COURT

(Filed December 21, 1967)

PER CURIAM:

Petitioner, Southern California Edison Company, pursuant to Section 19(b) of the Natural Gas Act, 15 U.S.C.A. Section 717r(b), seeks to set aside the July 26, 1966 Order of respondent, Federal Power Commission, which certificated proposals by El Paso Natural Gas Company and Transwestern Pipeline Company to increase the supplies of natural gas to distributors in southern California for resale to customers, including petitioner and the Los Angeles Department of Water and Power (LADWP), and denied certification of a proposal by Gulf Pacific Pipeline Company for direct sales exclusively to petitioner and LADWP.

Gulf Pacific Pipeline Company has now been dissolved. LADWP has not filed a petition for review nor sought to intervene herein. Humble Oil & Refining Company, the major gas supplier for the Gulf Pacific project, has terminated its gas supply contract with the petitioner, as have the other producers for this project. They have not filed petitions to intervene here. El Paso and Transwestern Pipeline have intervened in support of the Federal Power Commission's challenged Order.

The critical questions presented are whether, in a comparative proceeding by competing applicants for the certification of facilities and sales and/or transmission of gas to southern California, the Commission's Order was rationally based, supported by the record and reached by procedures required by law.

On review of the record we are of the opinion that the questions compel answers in the affirmative. The record discloses that the Commission complied with procedures required by law and that it reasonably exercised its discretion on substantial and sufficient basis in fact and law. Once the existence of a rational basis for the Commission's action is ascertained the reviewing power is estopped from further consideration of the Commission's action. See Dorchester Gas Producing Company v. Federal Power Commission, 353 F.2d 162 (1965), cert. den. 383 U.S. 969 (1966). And see, Community Broadcasting Service, Inc. v. Federal Communications Commission, 377 F.2d 143, 144 (1967), where it was held that the choice of competing applicants for a broadcasting license "rests within the sound judgment of the Commission".

For the reasons stated the July 26, 1966 Order of the Federal Power Commission will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 16434

SOUTHERN CALIFORNIA EDISON COMPANY,
Petitioner

v.

FEDERAL POWER COMMISSION,
Respondent

EL PASO NATURAL GAS COMPANY and
TRANSWESTERN PIPELINE CO.,
Intervenors

STATE OF NEW MEXICO,
Intervenor

SUR PETITION FOR REHEARING

Present: HASTIE, Chief Judge, MCLAUGHLIN, KALODNER, STALEY, FORMAN, SMITH, FREEDMAN, SEITZ and VAN DUSEN, Circuit Judges

The petition for rehearing filed by Petitioner in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

KALODNER

Circuit Judge

Dated: January 24, 1968

APPENDIX B

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

CONSTITUTION OF THE UNITED STATES

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

NATURAL GAS ACT

Section 1(b)

(Title 15 USC § 717(b))

NECESSITY FOR REGULATION OF NATURAL GAS COMPANIES

Section 1.

* * *

(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

* * *

NATURAL GAS ACT
Section 7(c) and (e)
(Title 15 USC § 717f (c) and (e))

EXTENSION OF FACILITIES, ABANDONMENT OF SERVICE

Sec. 7.

• • •

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations; *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be

decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

• • •

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

NATURAL GAS ACT
Section 19(b)
(Title 15 USC § 717r (b))

REHEARINGS; COURT REVIEW OF ORDERS

Sec. 19.

• • •

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28 U.S.C. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings

before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28 U.S.C. [now covered by section 1254 of Title 28 U.S.C. by 1948 amendment (C. 646, 62 Stat. 928)].

• • •

ADMINISTRATIVE PROCEDURES ACT
Chapter 324 — Public Law 404
60 Stat. 237-244 (1946)

• • •

ADJUDICATION

Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(a) NOTICE. — Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) PROCEDURE. — The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

• • •

Sec. 6. Except as otherwise provided in this Act —

(a) APPEARANCE. — Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency

function. Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding.

• • •

SEC. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section —

• • •

(c) EVIDENCE. — Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) RECORD. — The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for deci-

sion in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

• • •

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion —

• • •

(e) SCOPE OF REVIEW. — So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

• • •

TITLE 28 USC § 1254
Added Ch. 646, 62 Stat. 928 (1948)

"§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

• • •

REGULATIONS UNDER THE NATURAL GAS ACT
§ 157.11
(Title 18 C.F.R. § 157.11)

§ 157.11 **Hearings.**

(a) *General.* The Commission will schedule each application for public hearing at the earliest date possible giving due consideration to statutory requirements and other matters pending, with notice thereof as provided by § 1.19(b) of this chapter: *Provided, however,* That when an application is filed less than fifteen days prior to the commencement of a hearing theretofore ordered on a pending application and seeks authority to serve some or all of the markets sought in such pending application or is otherwise competitive with such pending application, the Commission will not schedule the new application for hearing until it has rendered its final decision on such pending application, except when, on its own motion, or on appropriate application, it finds that the public interest requires otherwise.

(b) *Shortened procedure.* If no protest or petition to intervene raises an issue of substance, the Commission may

upon request of the applicant dispose of an application in accordance with the provisions of § 1.32 (b) of this chapter. [17 F.R. 7386, Aug. 14, 1952].

RULES OF PRACTICE AND PROCEDURE OF THE FEDERAL POWER COMMISSION

Section 1.26(d)

(Title 18 C.F.R. § 1.26(d))

§ 1.26 Evidence.

* * *

(d) *Official notice of facts.* Official notice may be taken of such matters as might be judicially noticed by the courts of the United States or of any other matter of technical or scientific fact of established character peculiarly within the general knowledge of the Commission as an expert body; *Provided,* That any party shall, on timely request, be afforded an opportunity to show the contrary.

APPENDIX C

CHRONOLOGICAL STATEMENT

1. In December, 1961, Edison and Tennessee Gas Transmission Corporation affiliates filed applications with the FPC (CP62-172, et al.) for necessary authorizations in connection with the so-called Pemex project, a Texas to California pipeline project which proposed to traverse northern Mexico. After a number of days of hearing, the applications were withdrawn in favor of a contemplated substantially revised and improved project which became the Gulf Pacific Project. (R.2-6, Jt. App., pp. 1-3).

2. On February 12, 1963, Gulf Pacific filed its application (Docket No. CP63-223) to construct a pipeline from the Gulf Coast area of Texas to the Los Angeles area to deliver up to 865 million cubic feet per day of natural gas to Edison and LADWP for use in generating electricity in their respective electric generating plants in southern California. (R. 68829, Jt. App., p. 747).

3. On June 7, 1963, Gulf Pacific filed a "Motion for Commission Order giving Public Notice and Request for Early Hearing on Certificate Application" in FPC Docket CP63-223 (R. 55204-55210, Jt. App., pp. 468-74). This motion was renewed as part of the "Motion of Gulf Pacific Pipe Line Company Requesting Prompt Consolidated Hearing and Continuance" filed on June 21, 1963. (R. 55252-66, Jt. App., pp. 475-489).

4. On July 12, 1963, the Federal Power Commission issued its Opinion No. 393 and accompanying order denying a certificate to El Paso for the so-called Rock Springs project in which the Commission announced it would institute a comparative proceeding "to determine how the long-term needs for natural gas deliveries to Southern California may be met in the manner which is most desirable from the standpoint of the public interest" (*re El Paso Natural Gas Company*, et al., FPC Docket G-16235, 30 FPC 77, 92). The Commission in said order also indicated that in the

"new" proceeding further opportunity would be given for the presentation of evidence on alternative methods for serving the Southern California market, including the then pending Gulf Pacific proposal, expansion of El Paso's Southern Division's facilities and expansion of Transwestern, among others. The Commission then stated its intent to "defer action on the application of Gulf Pacific in Docket No. CP 63-223" and to "consolidate it with any other applications for major pipeline construction for the supply of gas to the Southern California market filed within three months of the issuance of this opinion and order." (30 FPC 77, 93).

5. On August 2, 1963, Gulf Pacific filed a "Motion to Expedite Procedure" requesting the Commission to issue immediately an order giving public notice of its application in FPC Docket CP 63-223 and to fix an early date for the filing of petitions to intervene therein and to schedule an early hearing (R. 55349-61, Jt. App., pp. 490-502). All of Gulf Pacific's motions to expedite were dismissed by the Commission's "Order on Motions to Expedite Hearings" issued on August 22, 1963 (R. 55416, Jt. App., p. 503).

6. On September 30, 1963, El Paso filed its application (Docket No. CP 64-91) to increase its deliveries to Pacific Lighting by 250 million cubic feet per day and later (November 12, 1963) "amended" said application to propose a purported alternative which would increase its deliveries to southern California by 575 million cubic feet per day. (R. 68827, Jt. App., p. 745)

7. Transwestern's application (Docket No. CP 63-204) proposing to increase its deliveries on a daily contract demand basis from 300 million cubic feet per day to 350 million cubic feet per day had been previously filed and on October 11, 1963, Transwestern filed a new application (Docket No. CP 64-91) proposing to increase its deliveries to Pacific Lighting to 640 million cubic feet per day. (R. 68828, Jt. App., p. 746).

8. By order of the Commission dated October 21, 1963, the applications at Docket Nos. CP 63-223, CP 63-204, CP 64-91 and CP 64-76 were consolidated for comparative consideration (R. 64738-44, Jt. App., pp. 554-60).

9. By order dated December 16, 1963, petitions to intervene in the consolidated proceedings, including Edison's, were granted by the Commission (R. 65736-9, Jt. App., pp. 608-11).

10. Direct, answering, and rebuttal evidence in the consolidated dockets was served in advance, and consolidated hearings commenced June 1, 1964, concluding on March 17, 1965, after 170 days of hearing, about 28,000 transcript pages of testimony and the presentation of nearly 900 exhibits.

11. After the exchange of opening (or initial), answering, and reply (or closing) briefs, Examiner Alvin A. Kurtz, who presided at the hearing and heard all of the evidence,[1] on December 16, 1965, issued his initial decision recommending that the Gulf Pacific application (Docket No. CP 63-223) be granted, subject to certain conditions, and that the El Paso and Transwestern applications, Dockets Nos. CP 64-76, CP 63-204 and CP 64-91, respectively, be denied (R. 66567-635, Jt. App., pp. 612-80). Exceptions were filed to the Examiner's Decision and the Commission, on July 26, 1966, issued its Opinion No. 500 and accompanying order reversing its Examiner and issuing certificates to El Paso and Transwestern and denying the certificate to Gulf Pacific (R. 68820-960, Jt. App. pp. 738-878). In spite of the voluminous record referred to above,

[1] In this connection it is pertinent, we believe, to point out that before the FPC's decision in the matter, every tribunal which personally heard a detailed presentation of the problem found in favor of Edison's position. These include the Examiner in *re El Paso Natural Gas Company*, FPC Docket G-12580, 22 FPC 906, the California Public Utilities Commission (CPUC) in this proceeding (see CPUC Brief to Examiner, p. 6), the Board of Water and Power Commissioners and the City Council of the City of Los Angeles (Witmer, R. 6-7, Jt. App., pp. 3-4), and the Air Pollution Control District of Los Angeles County (APCD).

the Commission, in attempting to support its decision, made multiple references to documents and other material outside the record and relied heavily on an off-the-record economic study, the results of which were disclosed to the parties for the first time in Opinion No. 500.

12. On August 23, 1966 Edison filed its petition for Rehearing of Opinion No. 500 and accompanying order (R. 68974-69041, Jt. App., pp. 884-951), objecting among other things, to the references to and reliance on material outside the record and the off-the-record economic study, and requesting opportunity to meet and rebut same.

13. On September 2, 1966, the Commission issued its Order Requiring Filing of Statements to show whether or not some or all of the issues raised in the petitions for rehearing had been rendered moot as a result of the termination of some of the gas purchase contracts underlying the Gulf Pacific project (R. 69127-8, Jt. App., pp. 990-1). Such statements were filed by Edison (R. 69257-69; c.f. R. 69156-61, Jt. App., pp. 1040-52, 993-8) Gulf Pacific, LADWP, California Public Utilities Commission, (CPUC), El Paso and Pacific Lighting.

14. On September 21, 1966, the Commission issued its "Order Granting Rehearing for Purposes of Adequate Consideration" (R. 69301-2, Jt. App., pp. 1053-4).

15. On December 9, 1966, the Commission issued its Opinion No. 500-A and Accompanying Order on Rehearing (R. 69314-38, Jt. App., pp. 1057-81) denying the petitions for rehearing.

16. On January 30, 1967, Edison docketed its Petition for Review with the Court of Appeals for the Third Circuit seeking review of the aforesaid orders accompanying Opinions Nos. 500 and 500-A of the Commission.

17. On December 21, 1967, the Court of Appeals for the Third Circuit affirmed said Commission orders and on January 24, 1968, denied Edison's petition for rehearing (App. A).

APPENDIX D

REVISION OF COMMISSION'S GAS BALANCE STUDY TO CORRECT DEFECTS

GAS BALANCE
Year 1970
WITH GULF PACIFIC

SUMMARY OF PRINCIPAL ASSUMPTIONS

Unless otherwise noted, the principal assumptions are identical to those in Appendix B to Opp. 500 (R. 68895-903, Jt. App., pp. 813-21) and Appendix to Opp. 500-A (R. 69333-8, Jt. App., pp. 1076-81). The Commission states (Summary - App. B. R. 68895, Jt. App., p. 813) it assumed the same market as Staff in its Studies in its Briefs; however, the Commission failed to note that Staff's market for "Potential Requirements" was approximately 23.7 M²cfd higher "With Gulf Pacific" than "Without Gulf Pacific." This study corrects that oversight. Rates for volumes purchased from out of state, where the contract demand differs from that used by the Commission, were taken from Staff's Studies. No additional storage facilities were added, and available storage used reflects efficient utilization of the basic supplies available, resulting in scheduling about 16,000 M²cf more "With Gulf Pacific" than did the Commission.

Basic Supply — M²cfd Jan. 1 - Oct. 31		Basic Supply — M²cfd After Nov. 1	
El Paso	1345.3	El Paso	1345.3
Transwestern Firm	350.0	Transwestern	640.0
Transwestern LX	110.0	California Basic	570.6
	1805.3		2555.9
California Basic	570.6	Gulf Pacific	800.4
	2375.9		3356.3
Gulf Pacific	800.4		
	3176.3		

Schedule 1

SUMMARY OF VOLUMES AND COSTS WITH GULF PACIFIC — Year 1970

Source	Contract Demand—Mcfd	Annual Volumes—Mcf	Load Factor—%	Cost at Delivery Point	Cost at Load Center	Avg. Cost ¢/Mcf
El Paso	1345.3	471,009.9	95.9	$138,077,196	$152,207,493	32.32¢
Transwestern — To 11/1/70						
Firm	350.0	106,400.0	100.0	41,953,520		
LX	110.0	33,440.0	100.0	7,022,400		
Transwestern — 11/1 to 12/31/70					67,303,600	37.63¢
Firm	640	39,040.0	100.0	12,961,280		
California						
Basic	570.6	208,270.0	100.0			
Seasonal	300.0	(5,000.0)	–0–	63,753,112	71,437,460	35.07¢
Emergency	125	406.8	47.9			
Storage	675.0	32,690.1	125.7		7,018,741	21.47¢
Total to Pacific Lighting		853,566.7		$263,767,508	$297,967,294	34.91¢
Gulf Pacific	800.4	292,146.0	100.0	85,832,495	85,832,495	29.38¢
Grand Total		1,145,712.7		$349,600,003	$383,799,789	33.50¢

Schedule 2
BORDER PRICE CALCULATION AND CALIFORNIA GAS COST WITH GULF PACIFIC

Source Border Price	Volume MPcf	100% L. F. Price ¢/Mcf	Cost Per Day $ M	Border Price ¢/Mcf	Total Cost
El Paso	1345.3	29.00	390.14		
Transwestern — Firm	350.0	39.43	138.00		
LX	110	21.00	23.10		
Total	1805.3		551.24	30.53	
California Gas Cost					
Basic	208,270.0	30.53			$63,584,831.00
Emergency	551.2	30.53			168,281.36
Total	208,821.2				$63,753,112.36
Transportation costs					
Basic	208,270.1				
Exchange	876.0				
Seasonal	10,000.0				
Emergency	406.8				
	219,552.8	@ 3.5¢			$ 7,684,348.00

Schedule 3

PRICING OF OUT OF STATE GAS WITH GULF PACIFIC

Source	Volume Demand	Volume Commodity	Demand Rate	Demand Cost
El Paso	1,345.3	471,009.9	$2.286/mo.	$36,904,269.60
Transwestern to 11/1/70				
Firm	350.0	106,400.0	(@ 100% L.F.)	
LX	110.0	33,440.0	–0–	–0–
Transwestern 11/1/70 to 12/31/70				
Firm	640.0	39,040	(@ 100% L.F.)	

Schedule 3

PRICING OF OUT OF STATE GAS WITH GULF PACIFIC

Commodity Rate	Commodity Cost	Total Cost	Transport Cost	Cost at Load Center
21.48¢	$101,172,926.52	$138,077,196.12	$14,130,297.00	$152,207,493.12
39.43¢		41,953,520.00		
21.00¢		7,022,400.00		
			$ 5,366,400.00	$ 67,303,600.00
33.20¢		12,961,280.00		

(This page intentionally left blank)

Schedule 4
STORAGE GAS
WITH GULF PACIFIC

La Goleta	
Fixed Cost	
23.26¢ × 13,500,000 Mcf	$3,140,100.00
Fuel Cost	
0.63¢ × 16,973,681	106,934.19
Variable Cost	
0.11¢ × 16,973,681	18,671.05
Sub-Total	$3,265,705.24
Montebello	
Fixed Cost	
23.26¢ × 12,500,000	$2,907,500.00
Fixed Charge — First 5,000,000	
4.95¢ × 5,000,000	247,500.00
Next 5,000,000 to 10,000,000	
4.95¢ × 5,000,000	247,500.00
Over 10,000,000	
4.4¢ × 5,716,419	251,522.44
Fuel Cost	
0.63¢ × 15,716,419	99,013.44
Sub-Total	$3,753,035.88
Total	$7,018,741.12

Schedule 5
Sheet 1 of 3

GAS BALANCE
YEAR 1970
WITH GULF PACIFIC

Period			Requirements		Requirements in Excess of Basic Supply		Deviations in Basic California Supply
No.	Month	Days	Firm	Potential	Firm	Potential	
1	1	6	2537.8	4369.0	161.9	1192.7	89.4
2	1	5	1986.6	3494.7	–0–	318.4	89.4
3	1	5	2075.9	3956.6	–0–	780.3	89.4
4	1	5	2267.6	4085.3	–0–	909.0	89.4
5	1	4	2011.4	3683.3	–0–	507.0	89.4
6	1	6	1928.3	3825.0	–0–	648.7	89.4
7	Subtotal			121580.2		23114.9	2771.4
8							
9	2	5	2118.3	3956.2	–0–	779.9	68.0
10	2	5	1953.7	3557.8	–0–	381.5	68.0
11	2	5	1927.0	3814.6	–0–	638.3	68.0
12	2	4	1971.1	3678.5	–0–	502.2	68.0
13	2	4	2340.0	4287.6	–0–	1111.3	68.0
14	2	5	2223.4	4151.2	–0–	974.9	68.0
15	Subtotal			109263.4		20327.0	1904.0
16							
17	3	6	1982.5	3803.9	–0–	627.6	20.0
18	3	6	1806.8	3603.3	–0–	427.0	20.0
19	3	4	1689.2	3382.2	–0–	205.9	20.0
20	3	5	1730.9	3524.9	–0–	348.6	20.0
21	3	4	1622.6	3140.2	–0–	(36.1)	–0–
22	3	6	1621.0	3443.4	–0–	267.1	20.0
23	Subtotal			108817.7		10352.4	540.0
24							
25	4	5	1637.2	3447.7	–0–	271.4	–0–
26	4	3	1306.5	2849.6	–0–	(326.7)	–0–
27	4	5	1463.3	3382.1	–0–	205.8	–0–
28	4	2	1261.9	2746.7	–0–	(429.6)	–0–
29	4	5	1158.5	3058.0	–0–	(118.3)	–0–
30	4	2	1182.7	2750.7	–0–	(425.6)	–0–
31	4	5	1311.7	3224.5	–0–	48.2	–0–
32	4	3	1079.7	2495.1	–0–	(681.2)	–0–
33	Subtotal			92590.4		(2698.6)	
34							
35	5	5	1286.6	3157.3	–0–	(19.0)	(20.9)
36	5	6	1199.9	3110.4	–0–	(65.9)	(67.8)
37	5	5	1039.8	2442.3	–0–	(734.0)	–0–
38	5	6	1151.9	3020.4	–0–	(155.9)	–0–
39	5	4	1047.7	2592.5	–0–	(583.8)	–0–
40	5	5	1091.4	2924.3	–0–	(252.0)	–0–
	Subtotal			89774.3		(8691.0)	(511.3)

Schedule 5
Sheet 1 of 3

GAS BALANCE
YEAR 1970
WITH GULF PACIFIC

North and South Colos Levee Supply	Exchange Gas Supply	Emergency Gas Supply	Storage (Input) Output	Deviations in Contract Supply		Market Curtailments
				El Paso	Transwestern	
100.0	4.7	67.8	675.0	-0-	-0-	255.8
-0-	4.7	-0-	-0-	-0-	-0-	224.3
-0-	4.7	-0-	400.0	-0-	-0-	286.2
150.0	4.7	-0-	400.0	-0-	-0-	264.9
150.0	4.7	-0-	-0-	-0-	-0-	262.9
-0-	4.7	-0-	200.0	-0-	-0-	354.6
1950.0	145.7	406.8	9250.0			8591.0
100.0	2.9	-0-	300.0	-0-	-0-	309.0
-0-	2.9	-0-	100.0	-0-	-0-	210.6
-0-	2.9	-0-	200.0	-0-	-0-	367.4
150.0	2.9	-0-	-0-	-0-	-0-	281.3
150.0	2.9	-0-	600.0	-0-	-0-	290.4
79.3	2.9	-0-	500.0	-0-	-0-	324.7
2096.5	81.2		7900.0			8345.3
200.0	2.9	-0-	200.0	-0-	-0-	204.7
-0-	2.9	-0-	200.0	-0-	-0-	204.1
-0-	2.9	-0-		-0-	-0-	183.0
-0-	2.9	-0-	200.0	-0-	-0-	125.7
-0-	2.9	-0-	(39.0)	-0-	-0-	-0-
-0-	2.9	-0-	200.0	-0-	-0-	44.2
1200.0	89.9		4444.0			4078.5
269.3	2.1	-0-	-0-	-0-	-0-	-0-
-0-	2.1	-0-	(328.8)	-0-	-0-	-0-
6.4	2.1	-0-	197.3	-0-	-0-	-0-
(250.0)	2.1	-0-	(115.3)	(66.4)	-0-	-0-
-0-	2.1	-0-	-0-	(120.4)	-0-	-0-
(250.0)	2.1	-0-	-0-	(177.7)	-0-	-0-
-0-	2.1	-0-	46.1	-0-	-0-	-0-
(250.0)	2.1	-0-	-0-	(433.3)	-0-	-0-
(371.5)	63.0		-0-	(2390.1)		
-0-	1.9	-0-	-0-	-0-	-0-	-0-
-0-	1.9	-0-	-0-	-0-	-0-	-0-
(110.0)	1.9	-0-	(400.0)	(225.9)	-0-	-0-
(38.1)	1.9	-0-	-0-	(119.7)	-0-	-0-
-0-	1.9	-0-	(400.0)	(185.7)	-0-	-0-
(110.0)	1.9	-0-	-0-	(143.9)	-0-	-0-
(1328.6)	58.9		(3600.0)	(3310.0)		

Schedule 5
Sheet 2 of 3

GAS BALANCE
YEAR 1970
WITH GULF PACIFIC

No.	Period: Month	Period: Days	Requirements: Firm	Requirements: Potential	Requirements in Excess of Basic Supply: Firm	Requirements in Excess of Basic Supply: Potential	Deviations in Basic California Supply
1	6	6	1104.6	3080.2	-0-	(96.1)	(67.2)
2	6	6	998.4	2986.3	-0-	(190.0)	(1.1)
3	6	4	880.4	2549.7	-0-	(626.6)	(27.7)
4	6	5	912.7	2927.8	-0-	(248.5)	(49.6)
5	6	4	846.4	2353.1	-0-	(823.2)	(24.3)
6	6	5	844.2	2909.8	-0-	(266.5)	(67.6)
7	Subtotal			85198.2		(10090.8)	(1203.8)
8							
9	7	5	889.4	2902.4	-0-	(273.9)	(24.9)
10	7	5	852.6	2926.7	-0-	(249.6)	(50.6)
11	7	5	768.7	2507.5	-0-	(668.8)	(19.8)
12	7	5	830.5	2912.2	-0-	(264.1)	(65.1)
13	7	6	750.0	2330.3	-0-	(846.0)	(47.0)
14	7	5	809.6	2850.1	-0-	(326.2)	(27.2)
15	Subtotal			84476.3		(13989.0)	(1220.0)
16							
17	8	5	751.8	2786.3	-0-	(390.0)	(69.0)
18	8	6	769.2	2793.2	-0-	(383.1)	(69.1)
19	8	4	664.6	2238.6	-0-	(937.7)	(69.7)
20	8	6	779.7	2819.5	-0-	(356.8)	(69.8)
21	8	4	688.5	2393.1	-0-	(783.2)	(69.2)
22	8	6	809.2	2826.6	-0-	(349.7)	(69.7)
23	Subtotal			83094.1		(15371.2)	(2152.2)
24							
25	9	5	794.3	2919.2	-0-	(257.1)	(58.6)
26	9	5	703.9	2296.3	-0-	(880.0)	(61.5)
27	9	5	844.9	2930.5	-0-	(245.8)	(47.3)
28	9	5	779.9	2513.0	-0-	(663.3)	(64.8)
29	9	5	892.1	2983.0	-0-	(193.3)	(64.8)
30	9	5	949.1	3071.4	-0-	(104.9)	(66.4)
31	Subtotal			83567.0		(11722.0)	(1817.0)
32							
33	10	5	930.4	3002.8	-0-	(173.5)	(65.6)
34	10	5	926.3	2506.2	-0-	(670.1)	(62.2)
35	10	5	1030.3	3054.3	-0-	(122.0)	(24.1)
36	10	4	969.0	2710.7	-0-	(465.6)	(7.7)
37	10	6	1119.5	3233.6	-0-	57.3	-0-
38	10	6	1303.6	3398.0	-0-	221.7	-0-
39	Subtotal			93448.9		(5016.4)	(790.3)
40							

Schedule 5
Sheet 2 of 3

GAS BALANCE
YEAR 1970
WITH GULF PACIFIC

North and South Coles Levee Supply	Exchange Gas Supply	Emergency Gas Supply	Storage (Input) Output	Deviations in Contract Supply		Market Curtailments
				El Paso	Transwestern	
-0-	1.1	-0-	-0-	(30.0)	-0-	-0-
-0-	1.1	-0-	(190.0)	-0-	-0-	-0-
-0-	1.1	-0-	(400.0)	(200.0)	-0-	-0-
-0-	1.1	-0-	-0-	(200.0)	-0-	-0-
(250.0)	1.1	-0-	(400.0)	(150.0)	-0-	-0-
(110.0)	1.1	-0-	-0-	(90.0)	-0-	-0-
(1550.0)	33.0		(4340.0)	(3030.0)		
-0-	1.0	-0-	(250.0)	-0-	-0-	-0-
(110.0)	1.0	-0-	-0-	(90.0)	-0-	-0-
(250.0)	1.0	-0-	(300.0)	(100.0)	-0-	-0-
-0-	1.0	-0-	(200.0)	-0-	-0-	-0-
(250.0)	1.0	-0-	(400.0)	(150.0)	-0-	-0-
(110.0)	1.0	-0-	(100.0)	(90.0)	-0-	-0-
(3850.0)	31.0		(6650.0)	(2300.0)		
-0-	1.0	-0-	(200.0)	(122.0)	-0-	-0-
-0-	1.0	-0-	(200.0)	(115.0)	-0-	-0-
(250.0)	1.0	-0-	(400.0)	(219.0)	-0-	-0-
(88.0)	1.0	-0-	(200.0)	-0-	-0-	-0-
(110.0)	1.0	-0-	(400.0)	(205.0)	-0-	-0-
(81.0)	1.0	-0-	(200.0)	-0-	-0-	-0-
(2454.0)	31.0		(7800.0)	(2996.0)		
-0-	1.5	-0-	-0-	(200.0)	-0-	-0-
(250.0)	1.5	-0-	(400.0)	(170.0)	-0-	-0-
-0-	1.5	-0-	(200.0)	-0-	-0-	-0-
-0-	1.5	-0-	(400.0)	(200.0)	-0-	-0-
-0-	1.5	-0-	(130.0)	-0-	-0-	-0-
-0-	1.5	-0-	(40.0)	-0-	-0-	-0-
(1250.0)	45.0		(5850.0)	(2850.0)		
-0-	2.1	-0-	-0-	(110.0)	-0-	-0-
(250.0)	2.1	-0-	(108.3)	(251.7)	-0-	-0-
-0-	2.1	-0-	-0-	(100.0)	-0-	-0-
(250.0)	2.1	-0-	-0-	(210.0)	-0-	-0-
-0-	2.1	-0-	55.2	-0-	-0-	-0-
-0-	2.1	-0-	219.6	-0-	-0-	-0-
(2250.0)	65.1		1107.3	(3148.5)		

Schedule 5
Sheet 3 of 3

GAS BALANCE
YEAR 1970
WITH GULF PACIFIC

Period			Requirements		Requirements in Excess of Basic Supply		Deviations in Basic California Supply
No.	Month	Days	Firm	Potential	Firm	Potential	
1	11	5	1147.7	3192.4	–0–	(163.9)	(67.3)
2	11	2	1123.0	2708.1	–0–	(648.2)	(51.6)
3	11	6	1286.6	3382.3	–0–	26.0	(60.2)
4	11	2	1136.8	2853.2	–0–	(503.1)	–0–
5	11	5	1772.1	3885.0	–0–	528.7	50.3
6	11	3	1662.3	3317.6	–0–	(38.7)	87.9
7	11	5	1942.0	3956.0	–0–	599.7	66.3
8	11	2	1763.8	3484.1	–0–	127.8	24.4
9	Subtotal			103504.4		2815.4	94.6
10							
11	12	5	1714.6	3809.9	–0–	453.6	89.4
12	12	5	1806.8	3638.8	–0–	282.5	78.3
13	12	5	1820.9	3888.6	–0–	532.3	52.1
14	12	6	1811.9	3535.6	–0–	179.3	75.1
15	12	5	1995.9	4026.8	–0–	670.5	86.3
16	12	5	2304.3	4311.2	–0–	954.9	80.7
17	Subtotal			119590.1		15544.8	2384.6
18							
19		Totals		1174905.0		72154.5	8495.5
20						(67579.0)	(8495.6)
21						4575.5	–0–

Schedule 5
Sheet 3 of 3

GAS BALANCE
YEAR 1970
WITH GULF PACIFIC

North and South Coles Levee Supply	Exchange Gas Supply	Emergency Gas Supply	Storage (Input) Output	Deviations in Contract Supply		Market Curtailments
				El Paso	Transwestern	
-0-	3.4	-0-	(100.0)	-0-	-0-	-0-
(25.6)	3.4	-0-	(574.4)	-0-	-0-	-0-
-0-	3.4	-0-	82.8	-0-	-0-	-0-
(258.1)	3.4	-0-	(248.4)	-0-	-0-	-0-
75.0	3.4	-0-	400.0	-0-	-0-	-0-
-0-	3.4	-0-	(130.0)	-0-	-0-	-0-
-0-	3.4	-0-	530.0	-0-	-0-	-0-
-0-	3.4	-0-	100.0	-0-	-0-	-0-
(192.4)	102.0		2811.2		-0-	-0-
100.0	4.2	-0-	-0-	-0-	-0-	260.0
-0-	4.2	-0-	-0-	-0-	-0-	200.0
100.0	4.2	-0-	100.0	-0-	-0-	276.0
-0-	4.2	-0-	-0-	-0-	-0-	100.0
100.0	4.2	-0-	300.0	-0-	-0-	180.0
300.0	4.2	-0-	145.5	-0-	-0-	424.5
3000.0	130.2		2727.5			7302.5
10000.0	876.0	406.8	32690.1	-0-	-0-	28317.3
(15000.0)	(-0-)	(-0-)	(32690.1)	(20024.6)	(-0-)	(-0-)
(5000.0)	876.0	406.8	-0-	(20024.6)	-0-	28317.3

APPENDIX E

Summary of Reasons In Support Of Court Of Appeals Determination That Case At Bar Not Moot

Under the principles established by the cases of *City of Pittsburgh vs. FPC,* 237 F.2d, 741 (1956), and *Scenic Hudson Preservation Conf. vs. FPC,* 354 F.2d 608 (1965), cert. den. 384 U.S. 941 (1966), Edison, as an intervenor in these proceedings, if it had never had any gas supply contracts and there had never been a Gulf Pacific Pipeline Company, would have been, is and would continue to be entitled to make a showing that the other applications should be denied because of better alternative possible means of bringing service to California, and could have sought judicial review of any subsequent erroneous decisions of the Commission, if it had been aggrieved by a refusal to receive such evidence, or by a disregard of such evidence after receipt, or by the Commission's application of erroneous standards or criteria, or by the Commission's deciding the case improperly in reliance on off-the-record matters, all as here demonstrated.

The Commission itself has consistently, since those decisions, recognized the propriety of such showings as to possible alternatives, despite the total absence of underlying commitments as to gas supplies or pipeline facilities supporting such possible alternatives. The most recent example is the very first case to come before the Commission involving applications for additional increments of gas under TSP for the California market. (*re El Paso Natural Gas Co.* Dockets CP67-217 et al.) By order of March 5, 1968, of which this Court can take judicial notice, the Commission denied motions to omit the intermediate decision procedure in said dockets for the following reasons:

> "In opposition to the movants' contentions, Staff points out that the issues in this proceeding are not simple

that the record before the Examiner consists of 28 volumes of transcript, 194 exhibits, and 20 items by reference, and that the principal issue is whether the Commission should deny the applications in favor of the construction of a 42-inch pipeline from the Delaware Basin to California which Staff contends would permit the California markets to be served in the most economic manner."[1]

Furthermore, under no conceivable circumstances could the issues raised by Edison concerning the Commission's arbitrary refusal appropriately to protect Edison and its customers by the necessary conditions to the El Paso and Transwestern certificates be considered moot or affected in any way by the dissolution of Gulf Pacific Pipeline Company or the termination of the underlying gas supply for the Gulf Pacific Project since these issues relate to the certificates which were granted by the Commission to El Paso and Transwestern and to the gas supplies covered thereby. (See Pet., pp. 28, et seq.).

An example of the appropriate relief which could now be granted to the petitioner in the case at bar, and which is sought by it, is set forth below. This Court has heretofore recognized the need for such relief because of the greater burdens which would otherwise be placed upon petitioner if it were placed in the position of a newcomer to the market. In this connection, as was observed by this Court

---

[1] As reflected in the record referred to, the fact is that there were no gas supply contracts that had been entered into to supply such a 42-inch pipeline, although the Staff, even in the face of the pending divestiture proceedings in Denver following this Court's decision in *Cascade Natural Gas Company v. El Paso Natural Gas Company*, had urged that a certificate be granted to El Paso Natural Gas Company, despite Staff's own recognition that if El Paso were to build such a line it would preclude any other suppliers from entering the California market for at least six years in the future, and in spite of the fact that El Paso had never contracted to nor even expressed any willingness to undertake to build such a pipeline.

in *U.S.A. vs. El Paso Natural Gas Company*, 376 US, 651, 660:

> "This is not a field where merchants are in a continuous daily struggle to hold old customers and to win new ones over from their rivals. . . Once the Commission grants authorization to construct facilities or to transport gas in interstate commerce, once the distributing contracts are made, the particular market is withdrawn from competition."

And the critical, practical necessity for a fair hearing being afforded a competing applicant was recognized by this Court in *Ashbacker Radio Corp. vs. FCC*, 326 U.S. 327, 332 (1945), when it stated:

> "As the Fetzer application has been granted, petitioner, therefore, is presently in the same position as a newcomer who seeks to displace an established broadcaster. By the grant of the Fetzer application petitioner has been placed under a greater burden than if its hearing had been earlier. Legal theory is one thing but the practicalities are different."

Furthermore, such relief would impose no added risk upon Transwestern or El Paso different from that which was represented to the Commission as being a risk which both were ready, willing and able to assume. (See Edison's Answer to El Paso Motion, p. 12). And there is evidence in this record of a continuing interest in the California market of the major Gulf Pacific supplier, Humble Oil and Refining Company, if the Commission is reversed in the case at bar. (R. 69160-1, Jt. App., pp. 997-8).

Example of Appropriate Form Of Relief For Petitioner

Order of Supreme Court that the Court of Appeals judgment of December 21, 1967, be reversed and the Commission's decisions be reversed and remanded for further proceedings consistent with the Court's Opinion, which further proceedings should effectively:

(1) Permit Edison a reasonable period of time to reconstitute a gas supply and transportation arrangements for such an independent pipeline project;

(2) Determine the lowest cost of gas to Edison and to the total market taking into account alternative feasible supply combinations, and giving due consideration to long-term, as well as short-term, price considerations;

(3) Determine the lowest cost of energy to Edison and to the total market, giving due consideration to the relative volumes of gas, oil or other fuel to be employed, their availability and their long-term price trends;

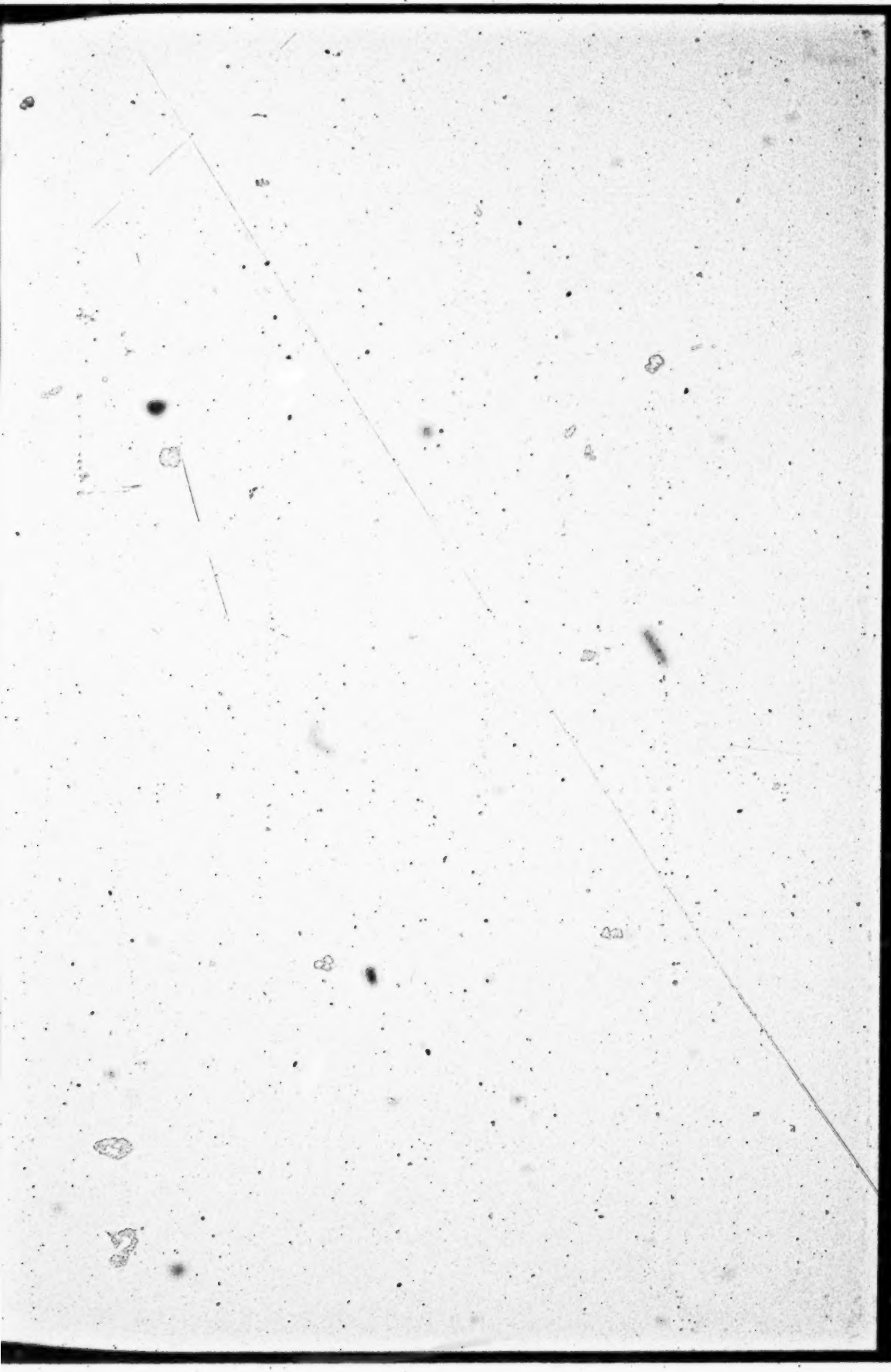
(4) Determine whether the local police regulations for air pollution control are deemed by the Commission to be in conflict or incompatible with any federal policy and, if not, determine what alternative gas supply arrangements will permit most effective compliance therewith. (*C.f., Huron Cement Co. v. Detroit,* 362 U.S. 440, 442 (1960));

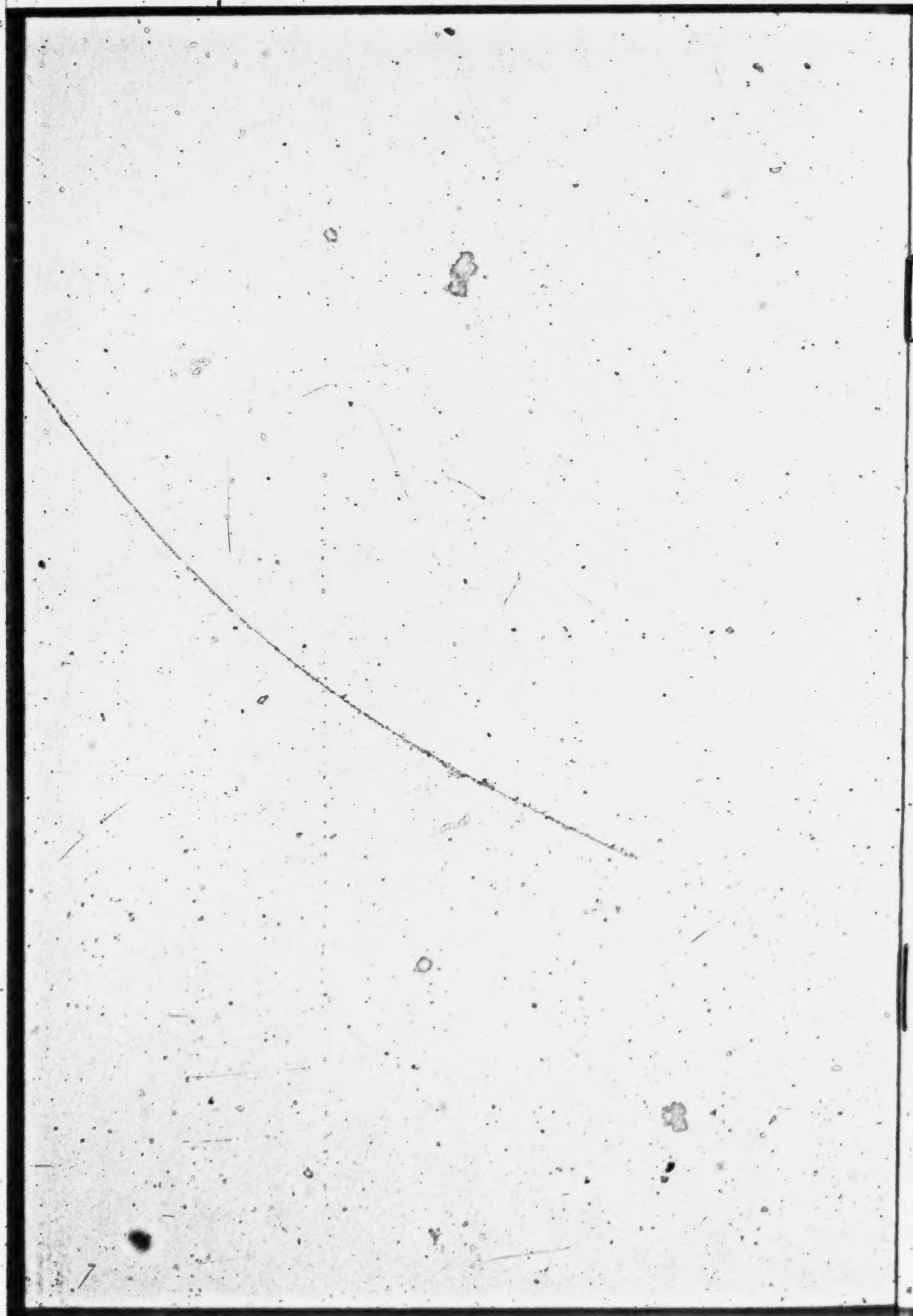
(5) Provide Edison and its customers with equal protection of the law by incorporating in the Commission's order conditions, if economics is to be the controlling consideration and if the Tailored Supply Program, or any part thereof, is to be certificated, which would protect Edison from being forced to purchase gas under local air pollution restrictions without regard to relative fuel costs;

(6) Determine whether, as of such time under the then posture of the pending divestiture proceedings (*U.S. vs. El Paso Natural Gas Company,* Civil Action No. 143-57 in U.S. District Court for the District of Utah), El Paso is able to present competent probative evidence of its ability to perform;

(7) Employ procedures which are as expeditious as possible and which will insure that any matter to be relied upon by the Commission is presented on the record, and that public documents and similar items of which the Commission may take notice are specified in such manner as to give any party the right to comment on or otherwise test and respond to the contents thereof;

(8) During the hearings on remand, and pending a final order of the Commission, permit El Paso and Transwestern to continue at their own risk, to operate the facilities already installed and deliver therefrom the volumes of gas capable of being delivered from such facilities, under temporary emergency authorization of the Commission, without prejudice to the remanded docket or any other docket involving proposals to deliver volumes of gas in addition to those at issue here.





LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 18 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1329

SOUTHERN CALIFORNIA EDISON COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

REPLY OF TRANSWESTERN PIPELINE COMPANY TO PETITION FOR WRIT OF CERTIORARI

JAMES W. McCARTNEY
2100 First City National Bank Building
Houston, Texas 77002
Attorney for Transwestern Pipeline Company

FIDELITY PRINTING COMPANY, INC., HOUSTON

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1329

SOUTHERN CALIFORNIA EDISON COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

REPLY OF TRANSWESTERN PIPELINE COMPANY TO PETITION FOR WRIT OF CERTIORARI

Transwestern Pipeline Company and El Paso Natural Gas Company were applicants for Federal Power Commission authorization to install facilities and to increase their deliveries of natural gas to the southern California market. The competing applicant in the proceedings was Gulf Pacific Pipeline Company. Its proposal was to deliver gas from Texas direct to the electric generating stations of Southern California Edison Company and the Department of Water and Power of the City of Los Angeles for use as fuel in electric generation. The hearings on these competing applications were very lengthy, extending from June 1964 through February 1965.

Transwestern disagrees with Edison's statement of the case.

What the Commission Did

The Commission did two things. It granted the Transwestern and El Paso applications and it denied the Gulf Pacific application to transport gas for Edison.

Insofar as its order, issued through Opinion 500, related to the denial of the Gulf Pacific application, it is moot. Gulf Pacific has been dissolved. The gas supply contracts between Edison and the producers have been cancelled (R. 69155A, 69184, 69214) The gas has been sold to others. Gulf Pacific's parent has stated in effect that the Commission's denial of the application was a blessing since under current money conditions the project likely could not have been financed and the funds could be more profitably invested elsewhere. (1966 Annual Report, Tenneco, Inc., p. 11, R. 53192)

Edison's stated concern with the Commission's denial of the Gulf Pacific application is that it will be "utilized in the future as a precedent" against Edison. (Edison Petition, p. 12) The Commission acted only on the Gulf Pacific application. It did not purport to prejudge any future Edison project.

Edison does not complain of the issuance of authorization to Transwestern and El Paso. To the contrary, it contends that the now defunct Gulf Pacific project was not "mutually exclusive" with the Transwestern and El Paso applications. Edison's sole complaint with regard to the Transwestern and El Paso authorizations is that the Commission, having, in Edison's view, concluded that economics controlled,

should have conditioned the Transwestern and El Paso certificates to *prevent* the delivery of gas to Edison when fuel oil is available at lesser cost to Edison[1].

What the Court Did

The Court of Appeals concluded that the record supported the issuance of authorizaion to Transwestern and El Paso. Among other things, the record showed that the proposed Transwestern gas supplies represented the lowest cost gas available, that the proposed Transwestern construction represented the least expensive capacity available, that Transwestern's existing pipeline system was being only partially utilized and that the capacity of that system could be developed at a very low incremental cost. (R. 56028, 68866-67) In addition, the record showed that Transwestern had a critical need to *sell* additional volumes of gas. Transwestern was under take or pay for obligation to purchase or pay for substantially more gas than it was then able to sell under its existing market commitments. (R 68876, 68926, 67452) It was, therefore, in the position of requiring immediate sales to balance its purchase obligations with its market requirements. At the same time it had the lowest cost capacity available. These facts were not challenged.

What the Court did was to hold that the Commission decision was not arbitrary and that it found record support. It can hardly be contended that its approval of the Transwestern or El Paso projects was arbitrary. The Commission's decision was correct. The Court's decision was correct.

---

[1] This contention is nonsense. It was urged in only the most cursory fashion in Edison's Motion for Rehearing before the Commission.

Edison's Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

RAYBOURNE THOMPSON
JAMES W. MCCARTNEY
VINSON, ELKINS, WEEMS & SEARLS
2100 First City National
Bank Building
Houston, Texas 77002

/s/ JAMES W. MCCARTNEY
James W. McCartney
2100 First City National
Bank Building
Houston, Texas 77002

Attorneys for Transwestern Pipeline Company

CERTIFICATE OF SERVICE

I certify that I have duly served copies of the above Reply of Transwestern Pipeline Company on all parties to the above proceeding as required by Rule 33 of the Rules of the Supreme Court.

/s/ JAMES W. MCCARTNEY
James W. McCartney

INDEX

	Page
Opinion below, Jurisdiction, and Statutes involved	1
Question presented	1
Statement	2
Argument	5
Conclusion	12

CITATIONS

Cases:

Alabama-Tennessee Natural Gas Co. v. *Federal Power Commission*, 359 F. 2d 318, certiorari denied, 385 U.S. 847	4
California v. *Federal Power Commission*, 345 F. 2d 917, certiorari denied, 382 U.S. 941	8
El Paso Natural Gas Co., 30 FPC 77	2
Federal Power Commission v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1	8, 10
Market Street Railway Co. v. *Railroad Commission of California*, 324 U.S. 548	8
Permian Basin Area Rate Case (*Skelly Oil Co.*), 34 FPC 159, affirmed in part and reversed in part, 375 F. 2d 6, affirmed, May 1, 1968, Sup. Ct. Nos. 90, 117, *et al.*, O.T. 1967	4
Republic Aviation Corp. v. *National Labor Relations Board*, 324 U.S. 793	8
Scenic Hudson Preservation Conference v. *Federal Power Commission*, 354 F. 2d 608, certiorari denied *sub nom. Consolidated Edison Co.* v. *Scenic Hudson Preservation Conference*, 384 U.S. 941	6
United States v. *Pierce Auto Lines*, 327 U.S. 515	8

Statutes:

Natural Gas Act, June 21, 1938, c. 556, section 7(c), 52 Stat. 824, as amended, 15 U.S.C. 717f(c) ..... Page 10

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1329

SOUTHERN CALIFORNIA EDISON COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINION BELOW, JURISDICTION AND STATUTES INVOLVED

The opinion of the court of appeals (Pet. 2a–3a) is now reported at 387 F. 2d 619. Otherwise, the opinions below, this Court's jurisdiction, and statutes involved are adequately described in the petition, pp. 1–2, 5a–14a.

QUESTION PRESENTED

Whether the Commission's certification of two consistent proposals—and not a third inconsistent one—for the sale and transportation of natural gas to southern California was rationally based, supported in the record, and reached through proper procedures.

STATEMENT

The Commission initiated a comparative proceeding to consider competing applications for certificates of public convenience and necessity for pipeline facilities to transport additional supplies of natural gas to southern California. *El Paso Natural Gas Co.*, 30 FPC 77, 92–93. Transwestern Pipeline Company and El Paso Natural Gas Company made separate proposals to expand their existing facilities to increase deliveries, in stages, from 300,000 Mcf to 640,000 Mcf per day for Transwestern and from 1,130,000 Mcf to 1,380,000 Mcf per day for El Paso, plus additional overrun ("LX") sales (J.A. 744–747).[1] The cost of Transwestern's proposed facilities was estimated at about $44 million (J.A. 746) and El Paso's at about $50 million (J.A. 745).

Major portions of the additional gas were to be sold to Pacific Lighting, a group of companies which are the principal distributors of gas in southern California[2] and which resell natural gas to, *inter alia*, petitioner and the Los Angeles Department of Water and Power ("Los Angeles Department") on an interruptible basis for boiler fuel (J.A. 614, 743). El Paso has customers in addition to Pacific Lighting in California and both El Paso and Transwestern have other customers in other States; both agreed, if they were granted certificates, to reduce their rates to all cus-

[1] "J.A." refers to the Joint Appendix in the court of appeals.

[2] The Pacific Lighting group consists of Southern California Gas Company, Southern Counties Gas Company of California, and Pacific Lighting Gas Supply Company (now Pacific Lighting Service and Supply Company), all subsidiaries of Pacific Lighting Corporation (J.A. 742).

tomers. The Commission found that the reductions would amount, in 20 years, to $165 million in the case of El Paso and $426 million in the case of Transwestern (J.A. 785, 786).

A competing application was filed by the now-dissolved Gulf Pacific Pipeline Company. It sought to build a new pipe line from Texas to southern California to transmit purchases which petitioner and the Los Angeles Department would make in Texas from Humble Oil & Refining Company and other producers. The estimated cost of the line exceeded $300 million. It would bring the two purchasers—but no one else—large quantities of natural gas, reaching, after five years of operation, 865,095 Mcf daily. (J.A. 747.)

After extensive proceedings, the Commission found that the combination of the El Paso and Transwestern proposals (referred to as the Tailored Supply Program or "TSP") would maintain the existing level of service and would better serve the public convenience and necessity (J.A. 795) than the Gulf Pacific proposal. The Commission found: 1) at the level of service it deemed preferable, the incremental cost of El Paso-Transwestern gas at the Los Angeles load centers would be lower than the cost of Gulf Pacific gas[3] (J.A. 783–789); 2) the El Paso-Trans-

[3] In these cost comparisons, the Commission made several assumptions favorable to Gulf Pacific: (1) although its contract called for a price of 18.5 cents per Mcf, the Commission assumed an in-line price of 17 cents (J.A. 777–778, 782); (2) the Commission based its comparison with the cost of the El Paso and Transwestern proposals on rates of return higher for each company than those then in effect or those the Commission finally allowed (J.A. 784, 806–807); (3) the Commission did not include in its cost figures possible further reductions in El-

western proposals would result in multi-million dollar annual savings to all customers including Pacific Lighting[4] (J.A. 787–788); and 3) there would be further savings to Pacific Lighting and petitioner in the purchase of California-produced gas, the price of which is mostly tied to the border price of out-of-state gas (J.A. 786). On the other hand, the Commission found that certification of all three proposals would result in an excess of supply and that, although the Gulf-Pacific proposal would provide greater volumes of gas to petitioner and the Los Angeles Department, it would tie them to large purchases for twenty years, thus impairing their flexibility to adjust to foreseeable developments in anti-pollution devices (J.A. 758–759, 796) and to alternative and possibly cheaper sources of energy, such as nuclear-powered plants, remotely located coal-fired steam electric plants, and extra-high-voltage interregional interties (J.A. 796–797).

The Commission denied Gulf Pacific's application and granted certificates to El Paso and Transwestern conditioned on their reducing their rates further than

---

Paso's and Transwestern's rates resulting from the producer rate reductions ordered in the *Permian Basin Area Rate Case*, 34 FPC 159, affirmed and reversed in part, *sub nom. Skelly Oil Co.*, 375 F. 2d 6 (C.A. 10), Commission affirmed, May 1, 1968, Nos. 90, 117, et al. O.T. 1967; and (4) the Commission also did not include the possibility of reduced tax costs on the basis of liberalized-depreciation savings, which the Commission has since required these companies to flow through to their customers. See *Alabama-Tennessee Natural Gas Co.* v. *Federal Power Commission*, 359 F. 2d 318 (C.A. 5), certiorari denied, 385 U.S. 847.

[4] Reductions have been put into effect saving Pacific Lighting $12 million annually. As a result its rates have been reduced, saving petitioner almost $3 million annually.

proposed, and required other, future rate reductions to pass on expected cost savings (J.A. 805–808). The certificates, so conditioned, were accepted by El Paso and Transwestern (J.A. 880, 882).

Gulf Pacific Pipeline Company was dissolved. The producers terminated their contracts for the sales of gas here involved to petitioner and the Los Angeles District; the gas has been sold to other purchasers (J.A. 998–1039).

Applications for rehearing were filed (J.A. 884–989) and denied (J.A. 1057–1071). Petitioner, but no other party, sought review in the Court of Appeals for the Third Circuit. That court, in a *per curiam* opinion (Pet. 2a–3a) affirmed the Commission's order.

ARGUMENT

The Commission proceeded in the manner required by law and based its decision on ample evidence of record. The petition, moreover, presents no question of general importance to the administration of the Natural Gas Act. The Gulf Pacific proposal is dead, and the issues relating to it are academic.

1. Petitioner did not raise in the court of appeals its present contentions (Pet. 20–24) that the Commission failed to give proper weight to the relative effect of the competing proposals on air pollution. But even if those arguments are properly here, they have no merit. Surely the Commission is not bound, as petitioner argues, by the judgment of the local au-

thorities.[5] The ultimate determination as to the overall public interest on the question of pollution rests with the Commission just as it does with respect to any other matter within the Commission's jurisdiction. Cf. *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 354 F. 2d 608 (C.A. 2), certiorari denied *sub nom. Consolidated Edison Co.* v. *Scenic Hudson Preservation Conference*, 384 U.S. 941.

Air pollution received a great deal of attention at the hearings[6] and in the Commission's decision (J.A. 750–759; see, also, J.A. 1060–1062). The Commission found (J.A. 758) "the record does not establish that certificating one rather than another of the proposals now before us will have any appreciable effect upon human health." The evidence the Commission cited amply supports this conclusion.

2. The Commission did not (see Pet. 12–20) improperly rely on, and deny petitioner an opportunity to cross-examine and rebut, material outside the record. The Gas Balance to which petitioner objects (Pet. 15–20) compares the costs of the gas that would be in the market with the addition of the amounts Gulf Pacific proposed to bring petitioner and the Los Angeles Department to the cost of all the gas that would be in the market upon certification of the TSP

[5] Significantly, none of these local authorities petitioned for review or sought intervention in the court of appeals, although some had appeared before the Commission.

[6] More than a month of hearings and thousands of pages of evidence were devoted to the subject. The Commission's holding with respect to air pollution was not challenged in the court below, so that relevant record material was not brought before that court.

proposals,[7] at the level of service the Commission found consistent with the public interest.[8] The computation is complex because of the limitations on available data,[9] and the variations in the rates for the gas coming into the market (see J.A. 815). The underlying

[7] The comparison showed that the "rolled-in," or fully distributed, costs of all gas delivered to Los Angeles would be one-fiftieth of a cent per Mcf less with the Gulf Pacific proposal than with the El Paso-Transwestern proposal. But this slight difference, as the Commission noted, would be outweighed by reductions in the proposed El Paso and Transwestern rates of return and other anticipated cost reductions, as well as by effected reductions in rates charged customers outside of California (J.A. 788).

[8] Petitioner's proferred revision of the Gas Balance (Pet. 19a–31a), which purports to "correct" the Commission's, is based on a higher level of gas service that includes the Gulf Pacific volumes *plus* additional volumes from El Paso and Transwestern.

Had the Commission taken this approach, the reduction in Transwestern's rates would have been deferred several years because Transwestern would not have begun to supply increased volumes until November 1, 1970, and El Paso's proferred rate reduction would be without cost justification, since the offer contemplated a 100 percent load factor, while petitioner's revision calls for an annual load factor of only 95.9 percent (Pet. 20a). Nevertheless, petitioner's calculation assumes that the rate reductions would have been immediately effected even if the Gulf Pacific proposal were accepted.

[9] The El Paso-Transwestern proposal covered the period through 1968, and the supply figures in the record did not go beyond that year. The Commission therefore used the figures for that year for El Paso and Transwestern, and to avoid the developmental years, figures estimated for the third year of operation of Gulf Pacific. This is why the Gas Balance showed, as petitioner notes (Pet. 19), a zero gas storage balance in the winter of 1970. But increased supplies after 1968 were not ruled out; indeed, with growing demand, maintenance of the level of service would require such increases (J.A. 760–765). Proceedings looking to additional supplies are indeed now in progress. See pp. 10–11, *infra*.

data are, however, all in the record,[10] in accordance with the rule of *Market Street Railway Co.* v. *Railroad Commission of California*, 324 U.S. 548, 560. The matters of which petitioner complains are only the conclusions the Commission inferred from these facts of record. Such a prognosis is plainly committed to the Commission's expert judgment; the right of cross examination attaches only to the underlying evidence. See *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 800; cf. *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 529–530; *California* v. *Federal Power Commission*, 345 F. 2d 917, 926–927 (C.A. 9), certiorari denied, 382 U.S. 941. That right petitioner had and exercised.[11]

3. It is true, as petitioner says (see Pet. 24–27), that the Commission first set out to determine in this matter how the long-term needs of the southern California market might be met, and then concluded the proceedings by certificating proposals that, by

[10] The Commission's figures for firm requirements (J.A. 1076–1081) are those in Exhibit 316 (J.A. 316–317). These figures were adjusted upward to reflect Gulf Pacific's estimate of annual interruptible steam electric potential (J.A. 241), averaged on a daily basis. See J.A. 813, 686–687.

[11] The Commission's citation of Congressional and other material not in the record were, as the Commission itself explained (J.A. 1063), merely cumulative of large volumes of evidence already in the record, see J.A. 11, 35–43, 70–82, 85–86, 88–89, 91–96, 193–212, 247–296. The Commission's decisions on these points could indeed have stood, without the references complained of, on the basis of the Commission's own expertise. "[A] forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency." *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29.

themselves, would supply only short-term needs. The record, however, simply did not provide the necessary evidence to determine how much gas would have to be brought into California in the future (J.A. 760). The evidence did show, on the other hand, that petitioner's proposal to certificate its project plus some part of the El Paso-Transwestern TSP proposal would deprive consumers of millions of dollars of savings (footnote 8, *supra*). It was equally clear that to certificate all three proposals would result in an excess of supply for several years, and that petitioner's proposal, by tying the area's major electric utilities to a twenty-year term for purchasing gas, was less in the public interest than the flexibility the El Paso–Transwestern proposal would afford in allowing the utilities to take advantage of future developments of other sources of energy (see p. 4 *supra*). Thus, the Commission acted reasonably, and with ample support in the record, in concluding that the long-term needs of the California market could be met better by periodic reappraisal of supply needs rather than by approval of the Gulf–Pacific project.[12]

[12] The charge of improper delay (Pet. 27; see, also, Pet. 15a–16a) is wholly unjustified. Although petitioner starts its chronology (Pet. 15a) in December 1961, when the "Pemex" proposal to supply petitioner was filed, that proposal was voluntarily abandoned after more than a year passed. The first Transwestern application was filed January 14, 1963. Gulf Pacific's (R. 53031–53115) was not completed until May 15, 1963. The last relevant application was filed October 11, 1963 (Pet. 16a). Petitioner filed a petition to intervene November 1, 1963 (R. 64821–64834).

A prehearing conference was held before a hearing examiner November 19 and 20, 1963 (J.A. 579–581). Cross-examination then began on June 1, 1964; 170 days of oral hearings were

4. The Commission did not ignore (see Pet. 29–30) the statutory limitation precluding it from regulating direct sales of gas for industrial uses. Section 7(c) of the Natural Gas Act requires the certification of all facilities for the transportation of gas in interstate commerce, whatever its intended use. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1. The power to deny a certificate obviously includes the power to prevent the sale. Where, as here, the Commission finds that certification would put upward pressure on prices in the interstate market (J.A. 779–781) and adversely affect the customers of the established supplier (J.A. 799), the denial of the certificate is sufficiently justified.

5. Gulf Pacific is out of existence and the gas supply is gone. Petitioner seems to recognize that the proposal is dead beyond revival; it seeks only vacation of the certificates issued to El Paso and Transwestern, to allow it to try to put together a new proposal to be considered in a new comparative hearing. In the meantime and until final decision thereon it requests that

---

completed March 17, 1965. Briefing to the examiner was completed August 2, 1965 (J.A. 149–150, 158). The examiner's decision was issued December 16, 1965 (J.A. 612). After the filing of extensive briefs on exceptions to the examiner's decision the Commission heard oral argument March 28 and 29, 1966. Its decision was issued July 26, 1966 (J.A. 738). Rehearing was requested on August 13, 1966, and granted on September 21, 1966 (J.A. 884–951, 1053–1054). The decision on rehearing issued on December 9, 1966 (J.A. 1057–1081).

Thus there was hardly an unnecessary or unreasonable delay in a vigorously contested comparative proceeding for certification of service to the lucrative southern California market, involving multi-million dollar facilities.

there be no interruption or suspension of the flow of El Paso-Transwestern gas.[13]

Further litigation of this case is wholly unnecessary to achieve such a result. Petitioner is entirely free to make new proposals. Proceedings are now pending on new certificate applications by Pacific Gas Transmission Company (Docket No. CP67–187) and El Paso (Docket Nos. CP67–188, CP67–217) for facilities to increase gas supplies to both northern and southern California.[14] Petitioner should advance any further proposals in those proceedings, where it has intervened in support of the El Paso application.[15]

The only change in result that petitioner seeks here[16] goes to the Commission's refusal (J.A. 1065–1066) to condition its certificates so as to require the withholding of gas supplies from the electric utilities if and when cheaper alternatives should be available. The evidence showed that the price of oil conforms to the price of gas (J.A. 69, 82–83, 143) and petitioner's witnesses testified that they assumed this relationship would continue. The requested condition would, more-

[13] See pp. 3–6 of petitioner's answer of September 22, 1967, to El Paso's motion to dismiss the petition in the court of appeals for mootness, which is on file with the Court.

[14] After the hearings began Transwestern also filed an application (Docket No. CP68–181) for a certificate for facilities to bring additional gas to southern California.

[15] The hearing examiner issued his intermediate decision April 19, 1968. He recommended granting the Pacific Gas Transmission application to bring gas to northern California and deferred decision on El Paso's application pending further hearings proposed by him to determine whether a project using larger facilities would be more in the public interest.

[16] See the third question presented (Pet. 3) and the argument at pp. 30–31 of the petition.

over, have allowed petitioner to circumvent a local air pollution regulation that forbids the use of oil when gas is available. The Commission recognized it did nothing to prevent the use of oil (J.A. 1066). It merely left local authorities free to decide whether future variations in the price of oil should permit power plants to terminate the use of gas, a plainly reasonable exercise of the Commission's discretion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

RICHARD A. SOLOMON,
General Counsel,

PETER H. SCHIFF,
Solicitor,

ROBERT L. RUSSELL,
Assistant General Counsel,

ISRAEL CONVISSER,
Attorney,
Federal Power Commission.

MAY 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 5 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 1329

SOUTHERN CALIFORNIA EDISON COMPANY,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent.

REPLY BRIEF OF PETITIONER

ROLLIN E. WOODBURY
HARRY W. STURGES, JR.
WILLIAM E. MARX
Attorneys for Petitioner,
Southern California Edison Company
P. O. Box 351
Los Angeles, Calif. 90053

Of Counsel:

WILLIAM R. CONNOLE
1000 Connecticut Avenue, N. W.
Washington, D. C.

R. CLYDE HARGROVE
P. O. Box 188
Shreveport, Louisiana

June 3, 1968

TABLE OF CASES

Case	Page
Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945)	2
California v. FPC, 369 U.S. 482 (1962)	6
Cascade Natural Gas Co. v. El Paso Natural Gas Co., 386 U.S. 129 (1967)	6
City of Pittsburgh v. FPC, 237 F.2d 741 (1956)	5
re El Paso Natural Gas Co., Docket G-12580, Opinion No. 333 (22 FPC 900)	9
Huron Cement Co. v. Detroit, 362 U.S. 440 (1960)	8
Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (1965), cert. den. 384 U.S. 941	5
United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964)	2, 6
Welch Co. v. New Hampshire, 306 U.S. 79 (1939)	8

IN THE

Supreme Court of the United States

October Term, 1967

No. 1329

SOUTHERN CALIFORNIA EDISON COMPANY,

Petitioner,

vs.

FEDERAL POWER COMMISSION,

Respondent.

REPLY BRIEF OF PETITIONER

Petitioner, Southern California Edison Company (petitioner or Edison), respectively submits this reply brief addressed to arguments first raised in the brief in opposition filed in these proceedings by the Federal Power Commission (Commission or FPC):

I

In its brief in opposition, FPC contends that further litigation is wholly unnecessary because the petitioner, who was aggrieved by the Commission's actions in this proceeding, is entirely free to advance any further proposals in new or pending proceedings (pp. 10-11 of Br. in Op.). That such contention is wholly impractical and would provide no adequate remedy or protection for the lawful rights of

an aggrieved petitioner, such as Edison in the case at bar, has heretofore been recognized by this Honorable Court in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 659-660 (1964), when it stated:

> "This is not a field where merchants are in a continuous daily struggle to hold old customers and to win new ones over from their rivals . . . Once the Commission grants authorization to construct facilities or to transport gas in interstate commerce, once the distributing contracts are made, the particular market is withdrawn from competition."

And the critical, practical necessity under such circumstances for a fair hearing being afforded in the comparative hearing itself was recognized by this Honorable Court in *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 332 (1945), when it stated:

> "As the Fetzer application [the El Paso and Transwestern applications in the case at bar] has been granted, petitioner [Edison in the case at bar], therefore, is presently in the same position as a newcomer who seeks to displace an established broadcaster. By the grant of the Fetzer application [El Paso and Transwestern in the case at bar] petitioner [Edison in the case at bar] has been placed under a greater burden than if its hearing had been earlier. Legal theory is one thing but the practicalities are different."

Thus, the suggestion by FPC that ample protection is afforded to petitioner because it could try again before that Commission in a new proceeding flies directly in the face of the decisions referred to above, recognizing the inadequacies of such suggested remedy.

It is demonstrably clear that the Commission in the case at bar has so far departed from the accepted and usual

course of administrative proceedings and from the most fundamental requirements of procedural due process of law as to call for an exercise of this Honorable Court's power of supervision[1]. Although quite a number of illustrations of such departure by the Commission might be cited, in the interest of brevity we list but two here:

First, the circumstance, that the Commission does not deny, as indeed it could not, that its off-the-record economic study, which played a major and decisive role in its decision, was predicated upon a defective gas balance study which was also off-the-record and never disclosed to the parties until its decision denying rehearing; such study admittedly postulated a zero gas balance in storage at a time of need (Footnote 9 of FPC brief in opposition and FPC brief to the Third Circuit, p. 25) and thus postulated a method of operation that no one claims (and no one with any expertise could claim) the system could be operated under; admittedly the purchase of more gas would be required, in order for the system to operate, and the admittedly higher costs involved in the purchase of such additional gas were nowhere reflected in the off-the-record economic study so utilized by the Commission as the principal basis for its decision;

Second, the circumstances that the Commission admittedly referred in its decision to a number of outside-the-record reports, one of which was entitled "Comparison of Coal Fired and Nuclear Power Plants for the TVA System" and, as clear evidence of its reliance on such report, stated:

> "Whatever merits Gulf Pacific's position may have had in 1964 when testimony on this subject was taken, it *now* appears that nuclear generation is meeting this economic test." (Op. No. 500, R. 68853; Jt. App. p. 771, emphasis added).

---

[1]C.f. Rule 19 of the Court Rules.

The Commission's only response to the first item, *supra*, is that the off-the-record studies utilized figures or data that were in the record. It is presumably contending that if a Commission's off-the-record study,[2] no matter how erroneous or inexpert it may be shown to be, utilizes data taken from the record (even if such data were submitted in the hearings in a different context or study where it might have been correctly employed and have required no cross-examination), the requirements of procedural due process have been met. Such contention, we submit is patently unsound, and is not supported by the cases to which the FPC refers.

In response to the second item, *supra*, the Commission states, in its footnote 11 of its brief in opposition, that the off-the-record material utilized by the Commission was merely cumulative. We submit that such explanation, as noted in the dissenting opinion, is not fairly reconcilable with the statement quoted above from the opinion of the Commission at the time of its decision. (See Dissent to Opinion No. 500-A, R. 69330, Jt. App., p. 1073.)

It is, we submit, thus abundantly clear that the procedures followed by the Commission involved a denial of the most fundamental requirements of a fair hearing and of procedural due process of law.

The petitioner's opportunity to return to the Commission in a new proceeding, as suggested in the FPC's brief in opposition (in all probability for more of the same in the absence of judicial redress in the case at bar) is obviously

---

[2]See the corrected study (App. D to petition) submitted to the Court of Appeals by petitioner, demonstrating the significance of the errors in the Commission's off-the-record study which could have been demonstrated had any opportunity to do so ever been afforded.

no substitute for petitioner's remedy to seek justice and due process of law from this Honorable Court.[3]

In this connection, the references by the Commission, in its brief in opposition, to the circumstances that the Gulf Pacific Pipeline Company has been dissolved and that the principal underlying gas supply contracts have been cancelled provide no support for FPC's position. Following the decisions in *City of Pittsburgh v. FPC*, 237 F.2d 741 (1956), and *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (1965), cert. den. 384 U.S. 941, the Commission has consistently recognized the right of a party to such proceedings to present evidence concerning better alternatives (even in the absence of any gas supply contracts or of any application being filed with respect to such alternative projects), and any failure of the Commission to accord such party due process in connection with such showing would entitle such aggrieved party to judicial relief. To illustrate, the Commission's own staff, in the pending proceedings referred to in footnote 15 of the Commission's brief in opposition, proposed, as a desirable alternative project, a new 42-inch pipeline project with respect to which there were no committed gas supplies whatsoever and no applicant. Furthermore, the record in this case shows a continuing interest in the California market by the major Gulf Pacific Project supplier, namely, Humble Oil and Refining Company, if the Commission is reversed in the case at bar (R. 69160-1, Jt. App. 997-8). In accord with such decisions, the Third Circuit Court of Appeals

[3]An appropriate form of legal remedy, suggested by the petitioner, that would protect its lawful rights, is set forth in its petition, pp. 34-A to 36-A. Furthermore, such relief would impose no added risk upon Transwestern or El Paso different from that which was represented to the Commission as being a risk which both were ready, willing and able to assume. (See Edison's answer to El Paso's Motion to Dismiss filed with Third Circuit p. 12).

correctly denied Transwestern and El Paso's motions to dismiss this case which were predicated upon the same circumstances referred to by the Commission.

II

Point 3 of the FPC's argument, in its brief in opposition, at pages 8-9, demonstrates the accuracy of Edison's contention that the Commission arbitrarily changed the ground rules which it had previously established as justification for its delays in processing the Gulf Pacific project application, because it shows that FPC did, in fact, abandon any long term resolution of the problems in favor of what it terms a "periodic reappraisal of supply needs rather than by approval of the Gulf Pacific Project". And, consider this anomaly which FPC's brief in opposition fails to bring to the Court's attention: the "larger facilities", referred to in the decision in the pending FPC proceedings, summarized in footnote 15 of FPC's brief, relate to a proposed new 42-inch pipeline from Texas (as compared with Gulf Pacific's proposed new 36-inch pipeline from Texas) initially suggested by the FPC staff to be built by El Paso because of its long term advantage. If constructed such "larger facilities" would, of course, similarly preclude such periodic reappraisal, and FPC's staff admitted its proposal would preclude any new competitive pipeline to California for many years to come. In this connection, FPC's staff has taken the position, in that proceeding, that there is nothing in the decisions of this Court in *Cascade Natural Gas Co. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967) or in the related cases of *California v. FPC*, 369 U.S. 482 (1962) or *United States vs. El Paso Natural Gas Co.*, 376 U.S. 651 (1964), requiring FPC to "stay its hand in granting any expansion larger than that proposed by El Paso in order to permit the new company to be formed as a result of the divestiture proceedings to compete for future

growth in California". So the FPC staff is once again urging a reversal of the field.

III

On page 5 of its brief in opposition FPC asserts that the question, discussed in Edison's petition (pages 20-24, relating to the Commission's preemption of the field of air pollution in a manner which frustrated local police regulations), was not raised before the Court of Appeals. This assertion is simply not accurate:

1. Edison's petition for review before the Third Circuit not only incorporated Edison's petition for rehearing before the Commission raising this issue (see R. 68974, 68979, 68997-69000, Jt. App. pp. 884, 889, 907-910) but in addition at pages 11-12 of Edison's petition for review to the Third Circuit Court of Appeals the following appeared:

> "3. The Commission erred by its improper application of the statutory standards involved.
>
> "a. It applied the standard of public convenience and necessity in an improper manner in denying higher levels of gas service as demanded by the public in southern California simply because it did not agree with the public's desires or reasons therefor, although, in so doing, it made no finding and expressed no determination that the satisfaction of the public demands in this regard would deprive other areas of adequate gas service."
>
> • • •
>
> "4. The Commission arbitrarily, capriciously and erroneously frustrated the authority of the local police regulations relating to air pollution in a situation in which there was no conflict or incompatibility with any federal policy, and at the same time arbi-

trarily, capriciously and unlawfully purported to delegate to the California authorities a responsibility which they cannot, so long as the Commission's opinion remains unreversed, exercise or comply with. The Commission also arbitrarily and improperly refused, in this connection, to exercise its appropriate authority to protect the electric utilities from an unworkable dilemma and to permit them to operate most economically."

2. In Edison's brief before the Third Circuit, the petitioner stated, in part, as follows, at page 40:

> "If the Commission did not intend to pre-empt the field, it should have given due recognition and effect to local police regulations (cf., *Huron Cement Co. v. Detroit*, 362 U.S. 440, 442 (1960); *Welch Co. v. New Hampshire*, 306 U.S. 79, 85 (1939). Under these circumstances, the Commission's denial of the Gulf Pacific Project, the certification of which would best permit compliance by the electric utilities with such local police regulations and which met the traditional tests of public convenience and necessity, represents a denial of their recognized rights and a violation of due process of law."

The Commission's newly indicated concern, reflected on page 12 of its brief in opposition, over any circumventions of local air pollution regulations, is both tardy and more than somewhat strange because: (a) the Gulf Pacific Project admittedly would have permitted higher levels of gas use for electric generation and would have significantly reduced the level of oil burning in southern California (R. 303-7, Jt. App., pp. 6-8, R. 18156, 18419-22, Jt. App., pp. 131-4, Ex. 639, 640, R. 35979-82, Jt. App. p. 364-7) all in compliance with the provisions and goals of the local air pollution control regulations, designed to increase the use

of natural gas for such purposes and in accordance with the desires of the public in southern California (R. 422-3, Jt. App. pp. 17-18), (b) it was the FPC that concluded that the local air pollution control authorities were wrong in their view that the substitution of natural gas for the burning of fuel oil would significantly assist in air pollution control (Op. 500, R. 68839, Jt. App. p. 757), and (c) it was the Commission, not Edison, that pre-empted the field and frustrated the desires of the air pollution control authorities and the public in southern California.

In the case at bar, the actions of the local air pollution control authorities, which were in no way in conflict with the national air pollution policies or the federal agencies directly responsible therefor (such as the Department of Health, Education and Welfare)[4], were frustrated by the actions of the FPC simply because FPC did not agree with such local agencies and the public's desires or reasons therefor, although, in so doing, it made no finding and expressed no determination that the satisfaction of the public's demands in this regard would deprive any other areas of adequate gas service. In this connection the position of FPC here, attempting to justify preemption of the air pollution field (Br. in Op., pp. 5-6), is difficult to reconcile with its position in *re El Paso Natural Gas Co.*, Docket G-12580, Opinion No. 333 (22 FPC 900, 903) that the California authorities "have the best knowledge of the smog problems" and that their expertise should not be preempted.

We respectfully submit that, with the increasing importance and significance, to the national and local public interest, of air pollution and its related control problems,

---

[4]E.g., Executive Order 11282 dated May 26, 1966 relating to restrictions on governmental installations and Title 42 C.F.R. Part 76, issued June 2, 1966. See other references in footnote 17, p. 22 of petition.

and the efforts of the local agencies to meet such problems in ways which conform to the policies of the federal authorities given direct responsibilities over air pollution, the important legal questions posed, as to the extent to which those efforts can be restricted and frustrated by the FPC in the exercise of its functions under the proper interpretation of the Natural Gas Act and the need for a judicial delineation of the areas of responsibility under the existing statutes of the agencies thus involved, merit consideration and determination by this Honorable Court.

Petitioner believes that the other arguments raised in the Commission's brief in opposition were anticipated and adequately covered in Edison's petition heretofore filed, to which this Honorable Court's attention is respectfully directed for a fuller statement of the grounds upon which Edison urges that its Petition For a Writ of Certiorari be granted.

Respectfully submitted,

ROLLIN E. WOODBURY
HARRY W. STURGES, JR.
WILLIAM E. MARX

By /s/ WILLIAM E. MARX
Attorneys for Petitioner
SOUTHERN CALIFORNIA EDISON COMPANY

DATED: June 3, 1968.